

**The Rights-Protecting Role and Impact of  
Commonwealth Parliamentary Committees: The  
Case of Australia's Counter-Terrorism Laws**

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## ABSTRACT

Uniquely in the Western world, Australia relies on an ‘exclusively parliamentary’ model of rights protection at the federal level, which relies heavily on Parliament rather than the courts to protect and promote rights. Central to this model of rights protection is the system of parliamentary committees that inquire into and scrutinise proposed laws.

This thesis tests the limits of the parliamentary model of rights protection, using a case study that includes 12 counter-terrorism-related Acts. In particular, this thesis explores whether parliamentary committees have had a rights-enhancing impact on these laws and whether the rights-enhancing impact of parliamentary committees can be improved.

The methodology employed in this research considers a range of evidence to provide a holistic account of the impact of the parliamentary committee system on the case study Acts. This includes consideration of the legislative impact of parliamentary committees on the content of the Acts, evidenced by legislative amendments attributed to the work of committees in parliamentary debates or Explanatory Memoranda. This research also considers the role parliamentary committees play in the public and parliamentary debate on the case study Acts, for example by considering references to individual committees in Hansard debates and media articles. In addition, this research investigates the hidden impact parliamentary committees may be having on policy development and legislative drafting, considering both documentary materials such as guidelines and manuals, as well as material obtained from interviews with key participants in the law-making process. This material is then considered against the backdrop of a broader analysis of the multiple stages of rights review that occur within the Australian Parliament, in the context of counter-terrorism law making at the federal level.

This thesis finds that parliamentary committees have had a rights-enhancing (although rarely rights-remedying) impact on the case study Acts, and that the nature of this impact varies across the different committees studied. Further, this thesis finds that the hidden or behind-the-scenes impact of parliamentary committees on the development of proposed laws provides a particularly fertile ground for improving the rights-protecting capacity of the committee system. Most significantly, this thesis finds that the rights-enhancing impact of parliamentary committees is most strongly felt when individual parliamentary committees work together as a *system*. This has important implications for the types of reforms that should be pursued to improve the rights-protecting capacity of the Australian Parliament.

This thesis concludes by offering a range of practical recommendations designed to improve the rights-enhancing capacity of the parliamentary committee system, while also solidifying the system's respected and valued place with the Australian Parliament. These system-wide recommendations are complemented by proposed committee-specific changes that aim to build upon the strengths of individual committees and maximise the potential for multiple committees to work collaboratively.

When taken together, this research shows that the parliamentary committee system is worth investing in as a way to improve the current parliamentary model of rights protection, and when exploring alternative models of rights protection at the federal level.

## DECLARATION

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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Signature: Sarah Moulds

16 March 2018



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## LIST OF ACRONYMS AND ABBREVIATIONS

|                            |  |
|----------------------------|--|
| ACT                        | Australian Capital Territory   |
| Citizenship Act            | <i>Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth)</i>   |
| AHRC                       | Australian Human Rights Commission   |
| AFP                        | Australian Federal Police  |
| ALRC                       | Australian Law Reform Commission   |
| ASIO BILL 2002             | Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth)  |
| ASIO BILL 2003             | Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 (Cth)  |
| Control Orders Act         | <i>Anti-terrorism Act (No 2) 2005 (Cth)</i>  |
| Victorian Charter          | <i>Charter of Rights and Responsibilities Act 2006 (Vic)</i>   |
| COAG                       | Council of Australian Governments  |
| Foreign Fighters Act       | <i>Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)</i>   |
| Parliamentary Scrutiny Act | <i>Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)</i>  |
| IGIS                       | Inspector General of Intelligence and Security   |
| INSLM                      | Independent National Security Legislation Monitor  |
| Haneef Inquiry             | Inquiry by the Hon John Clarke QC into the Case of Dr Mohamed Haneef   |
| National Consultation      | National Consultation on Human Rights (2009)   |
| NZ                         | New Zealand  |
| OIL                        | Office for International Law   |
| OPC                        | Office of Parliamentary Counsel  |
| PJC ON ASIO, ASIS and DSD  | Parliamentary Joint Committee on the Australian Security and Intelligence Organisation, Australian Secret Intelligence Service and Defence Signals Directorate |

|                           |   |
|---------------------------|---|
| PJCIS                     | Parliamentary Joint Committee on Intelligence and Security                                    |
| PJCHR                     | Parliamentary Joint Committee on Human Rights   |
| SOCS                      | Statements of Compatibility   |
| Sheller Committee         | Security Legislation Review Committee   |
| SLAT Acts                 | <i>Security Legislation Amendment (Terrorism) Act 2002</i> (Cth)<br>(and related Acts)        |
| LCA Legislation Committee | Senate Legal and Constitutional Affairs Legislation Committee                                 |
| LCA References Committee  | Senate Legal and Constitutional Affairs References Committee                                  |
| SFPAC                     | Senate Standing Committee on Finance and Public Administration                                |
| SSCSB                     | Senate Standing Committee on the Scrutiny of Bills  |
| SSCRO                     | Senate Standing Committee on Regulations and Ordinances                                       |
| Data Retention Act        | <i>Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015</i> (Cth) |
| UN                        | United Nations  |
| UK                        | United Kingdom  |

# PART I: PARLIAMENTARY COMMITTEES AND RIGHTS PROTECTION IN AUSTRALIA

## CHAPTER 1: INTRODUCTION

### *A Why Study Parliamentary Committees?*

The goal of this thesis is to evaluate the role parliamentary committees play in Australia's parliamentary model of rights protection, and to identify practical options for improving the rights-enhancing capacity of the parliamentary committee system. In short, it is a study of the work and role of federal parliamentary committees. My research uses the experience of developing, debating and enacting counter-terrorism laws in the period from 2001 to 2015 as a canvas to investigate the rights-enhancing impact of parliamentary committees. It focuses on four committees that have been particularly prominent in scrutinising Australia's counter-terrorism laws. These are the Senate Standing Committee for the Scrutiny of Bills (SSCSB), the Senate Standing Committee on Legal and Constitutional Affairs Legislation and References Committees (LCA Committees), the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Parliamentary Joint Committee on Human Rights (PJCHR). Using documentary and interview-based material, I argue that only by considering parliamentary committees working together as a system can we develop realistic proposals for substantive improvement in the parliamentary model of rights protection.

For many, parliamentary committees conjure banal images of bored parliamentarians drudging through piles of paperwork or harried public servants forced to answer seemingly never-ending questions about stationary purchases or office furnishings. The Senate Estimates process, which has left many a public servant shaking in their boots,<sup>1</sup> is perhaps the most well

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<sup>1</sup> See, eg, Simon Tatz, 'Senate estimates: We're all losers in this game of "gotcha"', *The Drum* (online), 19 October 2015 <<http://www.abc.net.au/news/2015-10-19/tatz-senate-estimates:-were-all-losers-in-this-game-of-gotcha/6860784>>; 'Senate Committee tests skills of top public servants', *Australian Financial Review* (online), 10 February 2016 <<http://www.afr.com/news/policy/budget/senate-committee-tests-the-skills-of-top-public-servants-20160209-gmq26t>>.

recognised committee activity by those not intimately involved in the legislative process. However, a closer look at parliamentary committees reveal that they both reflect and feed into the fundamental features and values of our federal Parliament. They provide a forum for all parliamentarians to play a role in the legislative process. They analyse proposed laws and policies and produce vital, independent information about their purpose, effectiveness and impact. They also provide a forum for experts and members of the community to share their views on a proposed law, and document the views of a wide range of individuals and organisations on matters critical to the lives and rights of Australians. In this way, parliamentary committees have both *deliberative* attributes (such as facilitating forums for the public to engage in the law-making process) and *authoritative* attributes (such as the power to publicly scrutinise the government's spending, or proposed laws or policies). As explored in detail below, these attributes can be present within individual committees, and across the committee system, and help explain the challenges and opportunities presented by parliamentary committees undertaking a rights-protecting role.<sup>2</sup>

As a rights advocate and law reformer,<sup>3</sup> this makes parliamentary committees particularly interesting to me. Like many other rights advocates,<sup>4</sup> when I started this research I was sceptical of the extent to which Australia's exclusively parliamentary model of rights protection (discussed below) could deliver meaningful outcomes for Australians.<sup>5</sup> I shared the orthodox

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<sup>2</sup> See discussion in Chapter 4, Section B(3).

<sup>3</sup> I am currently employed as a Senior Project Officer at the South Australian Law Reform Institute and an Associate Teacher at the University of Adelaide. Prior to commencing work at the institute, I was employed at the Law Council of Australia including as Director of Criminal Law and Human Rights. I have held policy roles at AusAID and the South Australian Attorney-General's Department. I have also worked as a legal policy advisor to former Australian Greens Senator Penny Wright. During my employment, former Senator Wright was the Chair of the Senate Legal and Constitutional Affairs References Committee and a member of the Parliamentary Joint Committee on Human Rights.

<sup>4</sup> See, eg, Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Paper presented in the Department of the Senate Occasional Lecture Series, Canberra, 8 December 2006). See also James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *Australian Institute of Administrative Law Forum* 13; David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58; Rosalind Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 75; Hugh Mannreitz, 'Commonwealth Statements of Compatibility – Small Steps, Early Days' (2012) 71 *Human Rights Law Centre Bulletin* 8; Bryan Horrigan, 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' (2012) 37 *Alternative Law Journal* 228; Lisa Burton and George Williams, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58, 81.

<sup>5</sup> This scepticism seems to be shared by many in the Australian community, with around 80 per cent of those polled during the National Consultation on Human Rights calling for the courts to play a more active role in rights protection in Australia. See Colmar Brunton Social Research, *Final Report, National Human Rights Consultation*

view that within a system of representative and responsible government like Australia, which provides ideal conditions for executive dominance, parliamentary committees have very little influence on the legislative process and limited means of providing rights protection unless backed up by judicial intervention.<sup>6</sup> Having participated in many parliamentary committee proceedings from a range of standpoints, I was sceptical of the extent to which parliamentary committees could improve the overall effectiveness of the parliamentary model of rights protection.

However, after undertaking this research, and in particular, having spoken to a broad range of key participants in the committee system,<sup>7</sup> I have changed my view. I am convinced that parliamentary committees can and do have a significant rights-enhancing impact on the development and content of our laws and, when considered as a system, provide fertile ground for improving the overall capacity of the parliamentary model of rights protection to deliver real results for the Australian community.

As discussed below, this does not mean I am advocating the retention of the status quo when it comes to rights protection in Australia. Important changes must be made to the way individual parliamentary committees go about their work, and to the way committees interact as a system.<sup>8</sup> In addition, it is important to note the limits of the rights impact shown by research. My research suggests that parliamentary committees can have an important rights-*enhancing* impact on the development and content of counter-terrorism laws that is different in character and scope to the rights-*remedying* changes that would be necessary to ensure that Australia complies with its full range of international human rights obligations. Broader structural reforms, such as the introduction of a more explicit role for the judiciary in rights protection, may still be necessary to guarantee comprehensive rights protection in Australia. In other words, I am not arguing that the current system of parliamentary committees should be relied upon as a comprehensive rights-protection regime, but rather that this system has the potential

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– *Community Research Phase* (2009) 10. See also Philip Lynch, ‘Rights bill is long overdue’ *Sydney Morning Herald*, 1 March 2010.

<sup>6</sup> For a comparative perspective see Andrew C Banfield and Rainer Knopff, ‘Legislative Versus Judicial Checks and Balances: Comparing Rights Policies Across Regimes’ (2009) 44(1) *Australian Journal of Political Science* 13.

<sup>7</sup> The interview material is introduced in further detail in Chapter 2 and Appendix A.

<sup>8</sup> These changes are outlined in Part III, and summarised in Table 9.1.

to deliver meaningful rights outcomes and thus should be carefully considered by rights advocates, including those arguing for more radical structural change.

For these reasons, I suggest that studying parliamentary committees is particularly important for any scholar interested in rights protection, as well as any lawyer seeking to understand how laws are made at the federal level. Studying parliamentary committees tells us something useful about how the Parliament balances competing public interests and rights, and how the legislature approaches its task of giving legal effect to public policy.<sup>9</sup> Looking at how parliamentary committees operate, as well as how policy makers and parliamentary counsel interact with these committees, also allows lawyers to gain important perspectives about the extent to which the legal principles they take for granted are reflected in the legislative process at the federal level. This is particularly relevant in the area of counter-terrorism law, which comprises the central case study for this thesis, as is evident by the robust public law scholarship on these laws,<sup>10</sup> which has included a sustained focus on legislative scrutiny and reform.<sup>11</sup>

Although my research focuses on the role parliamentary committees play in scrutinising and developing legislation, these committees play a range of other important roles in the parliamentary system, including as forums to hold the executive to account for public spending and to investigate and resolve transgressions in parliamentary rules and procedures.<sup>12</sup> This means that there is a clear public interest in ensuring that parliamentary committees are

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<sup>9</sup> A number of scholars have identified this type of inquiry as central to the modern understanding of ‘public law’. See, eg, Melissa Castan and Kate Galloway, ‘Extending Public Law: Digital Engagement, Education and Academic Identity’ (2015) 25 *Legal Education Review* 331, 331. See also James Spigelman, ‘Public Law and the Executive’ (2010) 34 *Australian Bar Review* 10, 13.

<sup>10</sup> Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Legislative Framework: How Deliberative has Parliament Been?’ (2016) 27(4) *Public Law Review* 271; Gabrielle Appleby, ‘The 2014 Counter-terrorism Reforms in Review’ (2015) 26(1) *Public Law Review* 4; Alexander Reilly and Andrew Lynch, ‘The Constitutional Validity of Terrorism Orders of Control and Preventative Detention’ (2007) 10 *Flinders Journal of Law Reform* 105.

<sup>11</sup> See, eg, Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006); Council of Australian Governments Counter-Terrorism Review Committee, *Review of Counter-Terrorism Legislation* (2013); Mark John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008); Bret Walker, *Independent National Security Legislation Monitor, Annual Report* (2011) <<http://www.dpmc.gov.au/publications/INSLM/index.cfm>>.

<sup>12</sup> See Chapter 3, Section A.



performing efficiently and effectively in each of these roles, and a need to understand how individual committees perform their various functions within the broader committee system.

Improving the effectiveness of parliamentary committees is also of interest to those who spend a large proportion of their time engaged in committee work. Interviews with parliamentarians suggest that for opposition Senators and government backbenchers, committee work represents the *major* aspect of their parliamentary life.<sup>13</sup> For some submission makers, engagement with parliamentary committees is a key plank of their advocacy strategy,<sup>14</sup> and entire units of public servants are dedicated to ensuring effective engagement with these committees.<sup>15</sup> Some of these people have expressed views about how to improve the parliamentary committee system. By listening carefully to their views, and reflecting on other sources of evidence of how the committee system works, I can identify practical options for improving the impact and efficiency of the committee system.

## 1 *Why Is This Research Unique?*

The scope, methodology and findings of this thesis are unique, primarily because this research evaluates the rights-protecting role of parliamentary committees working together *as a system*, rather than simply focusing on the effectiveness of a particular committee.<sup>16</sup> In addition, this

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<sup>13</sup> See, eg, Interview with Don Farrell, Australian Labor Party Senator for South Australia (Adelaide, 15 November 2016); Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>14</sup> See, eg, Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016); Interview with Nicola McGarrity, Gilbert & Tobin Centre for Public Law (Sydney, 31 May 2016); Interview with Legal Submission Maker (Canberra, 24 May 2016).

<sup>15</sup> See, eg, Department of Parliamentary Services, *Employment: Department of Parliamentary Services* <[http://www.aph.gov.au/About\\_Parliament/Employment/Department\\_of\\_Parliamentary\\_Services](http://www.aph.gov.au/About_Parliament/Employment/Department_of_Parliamentary_Services)>.

<sup>16</sup> For examples of committee-specific studies see Adam Fletcher, 'Human Rights Scrutiny in the Australian Parliament' (Paper presented at 'Evaluating Inquests, Commissions and Inquiries' Symposium, La Trobe University, Melbourne, 1 November 2017); George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 258; George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469; Tom Campbell and Stephen Morris, 'Human rights for democracies: a provisional assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7; Catherine Rodgers, 'A Comparative Analysis of Rights Scrutiny of Bills in New Zealand, Australia and the United Kingdom: Is New Zealand Lagging Behind its Peers?' (2012) 1 *Australasian Parliamentary Review* 4; Stephen Argument, 'Of Parliament, Pigs and Lipstick (Slight Return): A Defence of the Work of Legislative Scrutiny Committees in Human Rights Protection' (Paper presented at the Australian Institute of Administrative Law Forum, Canberra, 21–22 July 2011).

thesis looks for evidence of three different types of impact parliamentary committees have on proposed laws and employs a specifically developed, transparent assessment framework that addresses the challenges identified in previous attempts to evaluate parliamentary committees. In particular, my research collects and analyses the legislative, public and hidden impact of parliamentary committees on Australia's counter-terrorism laws. This allows my research to transcend the typical inquiry into whether parliamentary committees influence the content of the law.<sup>17</sup> I look 'behind the scenes' to uncover whether parliamentary committees have an influence on the development of proposed laws at the pre-introduction phase. To do this, I use evidence obtained from interviews with those responsible for developing Australia's counter-terrorism laws, and those who support and advise parliamentary committees, in addition to public sources such as Drafting Directions<sup>18</sup> and the *Legislation Handbook*.<sup>19</sup> The interview material also shapes the recommendations made in Part III and provides a unique source of information against which to test findings derived from my analysis of Hansard debates, committee transcripts and reports.

My thesis also explicitly recognises that individual committees have distinct functions and goals, which influence their potential to have a strong rights-enhancing impact, and allow them to contribute in different ways to the parliamentary committee system. As Chapter 3 explains, understanding how committees contribute to the broader functions of Parliament helps to elucidate realistic options for improving the capacity of the system to contribute to Australia's parliamentary model of rights protection.

## 2 *Why Use Counter-Terrorism Law as a Case Study?*

My research does not aim to evaluate *every* experience of formal parliamentary scrutiny at the federal level. This would be a near impossible task. Rather, I focus on one particularly powerful

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<sup>17</sup> See, eg, Ian Holland, 'Senate Committees and the Legislative Process' (Parliamentary Studies Paper No 7, Crawford School of Economics and Government, Australian National University, 2009) <[http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07\\_Holland.ashx](http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07_Holland.ashx)>.

<sup>18</sup> Drafting Directions are instructions that are issued by First Parliamentary Counsel. See, eg, Office of Parliamentary Counsel (Cth), *Drafting Direction No 3.1* (January 2017) <[https://www.opc.gov.au/about/draft\\_directions.htm](https://www.opc.gov.au/about/draft_directions.htm)>.

<sup>19</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2017) <<https://www.dpmc.gov.au/resource-centre/government/legislation-handbook>>.

case study, 12 counter-terrorism Acts,<sup>20</sup> to demonstrate how multiple committees work together, and to highlight the circumstances in which these committees have a particularly strong rights-enhancing impact.

I selected the counter-terrorism case study following a careful review of past efforts to evaluate parliamentary committees in Australia and elsewhere.<sup>21</sup> While no consistent criteria for selecting case studies emerges from these past evaluations,<sup>22</sup> it is clear that the most useful case studies are those that provide the maximum opportunity to gather a diverse range of information relating to the evaluation criteria being applied.<sup>23</sup> Past studies also suggest that, in order to offer a sufficiently robust evaluation, it is necessary to select a case study that:

- is appropriate for the jurisdiction being considered (in this case, federal);
- has a predominantly legislative, rather than regulatory, character;
- addresses subject matter that generates strong parliamentary attention, evokes public discussion and engages a broad range of individual rights and freedoms;
- engages a range of government department and agencies, as well as non-government organisations and community groups; and

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<sup>20</sup> The 12 case study Acts are the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth); *National Security Legislation Amendment Act 2010* (Cth); *Independent National Security Legislation Monitor Act 2010* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth); *National Security Information (Criminal Proceedings) Act 2004* (Cth); *Anti-terrorism Act 2004* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth); *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (and related Acts). As discussed further in Chapter 2, I selected these 12 Bills from more than 50 counter-terrorism related laws introduced during the period 2001–15. One of the case study ‘Acts’, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), is more correctly described as a ‘Bill’ as it was not enacted into legislation. As discussed further below, this Bill is included in the case study Acts as it was subject to rigorous multi-committee scrutiny and preceded the enactment of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

<sup>21</sup> These studies are described in Chapter 2.

<sup>22</sup> A number of past evaluations of parliamentary committees are considered in detail in Chapter 2.

<sup>23</sup> See, eg, J Smookler, ‘Making a Difference? The Effectiveness of Pre-Legislative Scrutiny’ (2006) 59 *Parliamentary Affairs* 522, 533.

- extends across a range of governments, parliaments and individual political personalities.<sup>24</sup>

Unlike other examples of prolific legislative activity over the past 15 years, the counter-terrorism case study easily meets the full range of criteria necessary to undertake a robust and systematic evaluation of the parliamentary scrutiny system in action.<sup>25</sup>

Some have suggested that selecting case studies that involve the implementation of popularist, bipartisan policies, or that respond to particularly significant domestic or international events, may present risks when seeking to analyse or assess formal parliamentary scrutiny.<sup>26</sup> There may be an assumption, for example, that the strong bipartisan support for ‘tough on terror’ policies sidelines or excludes any meaningful parliamentary scrutiny. However, the analysis undertaken in this thesis suggests that this is not the case in practice. In fact, as Part II

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<sup>24</sup> These criteria have been deduced from consideration of a range of past studies of parliamentary committees discussed in Chapter 2, in particular Section B. These studies include: Malcolm Aldons, ‘Rating the Effectiveness of Parliamentary Committee Reports: The Methodology’ (2000) 15(1) *Legislative Studies* 22; Malcolm Aldons, ‘Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?’ (2003) 18(1) *Australasian Parliamentary Review* 79; Meghan Benton and Meg Russell, ‘Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons’ (2013) 66 *Parliamentary Affairs* 772; Carolyn Evans and Simon Evans, ‘Evaluating the Human Rights Performance of Legislatures’ (2006) 6 *Human Rights Law Review* 545; Carolyn Evans and Simon Evans, ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’ (2006) *Public Law* 785; David Feldman, ‘The Impact of Human Rights on the UK Legislative Process’ (2004) 25 *Statute Law Review* 91; Gareth Griffith, ‘Parliament and Accountability: The Role of Parliamentary Oversight Committees’ (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); John Halligan, ‘Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level’ (2008) 23(2) *Australasian Parliamentary Review* 135; D Hawes, ‘Parliamentary Select Committees: Some Case Studies in Contingent Influence’ (1992) 20 *Policy & Politics* 227; Holland, above n 17; Geoffrey Lindell, ‘How (and Whether?) to Evaluate Parliamentary Committees – From a Lawyer’s Perspective’ (2005) August *About the House* 55; Lawrence D Longley and Roger H Davidson, ‘Parliamentary committees: Changing perspectives on changing institutions’ (1998) 4(1) *Journal of Legislative Studies* 1; Ian Marsh, ‘Australia’s Representation Gap: A Role for Parliamentary Committees?’ (Speech delivered at the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 26 November 2004); David Monk, ‘A Framework for Evaluating the Performance of Committees in Westminster Parliaments’ (2010) 16 *Journal of Legislative Studies* 1; Meg Russell and Meghan Benton, ‘Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches’ (Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009); Meg Russell and Meghan Benton, ‘Does the Executive Dominate the Westminster Legislative Process? Six Reasons for Doubt’ (2016) 69 *Parliamentary Affairs* 28; J Smookler, above n 23; Michael C Tolley, ‘Parliamentary scrutiny of rights in the United Kingdom: assessing the work of the Joint Committee on Human Rights’ (2009) 44(1) *Australian Journal of Political Science* 41; John Uhr, ‘Parliamentary measures: Evaluating parliament’s policy role’ in Ian Marsh (ed), *Governing in the 1990s: An agenda for the decade* (Longman, 1993) 347.

<sup>25</sup> This is discussed in further detail in Chapter 2.

<sup>26</sup> A number of scholars have sought to avoid these issues by selecting a broad spectrum of thematic areas for their evaluations of parliamentary committees including: Evans and Evans, ‘Evaluating the Human Rights Performance of Legislatures’, above n 24; Benton and Russell, ‘Assessing the Impact of Parliamentary Oversight Committees’, above n 24; Williams and Burton, above n 16; Williams and Reynolds, above n 16.

demonstrates, the impact of parliamentary committee scrutiny on the case study Acts was significant and multi-faceted, despite – and in some cases because of – the particular legal and socio-political characteristics of the case study Acts.

The 12 Acts comprising this case study have some exceptional features. For example, many of the Acts were introduced in response to extraordinary international or domestic events or particular threats to Australia's national security,<sup>27</sup> and propose novel powers for intelligence and law enforcement agencies, and/or new criminal offences.<sup>28</sup> The majority of these laws remove or at least limit a large number of individual rights and freedoms, change the parameters of criminal liability and extend the powers of law enforcement and intelligence agencies. They have also been introduced against an international context where it is important that a 'state of trust' exists between the Australian community and the national security agencies charged with protecting them from the threat of terrorism.<sup>29</sup> Taken together, the 12 case study Acts represent one of the most significant and rights-engaging areas of federal legislative activity over the last two decades, making it a particularly important subject area for detailed legal analysis.

Australia's counter-terrorism laws also provide the perfect canvas for evaluating the rights-protecting role of parliamentary committees. In the absence of a charter or bill of rights at the federal level, scrutiny by parliamentary committees is one of the only practical means by which the rights-intrusive scope of these laws can be curtailed and the state of trust between the community and the national security agencies preserved. This makes studying the impact of parliamentary committees on the content and development of counter-terrorism laws not just interesting, but also critically important. As Evans and Evans observe:

Around the world the commitment of legislatures to human rights is being tested as they respond to terrorism, national security concerns and natural disasters. It is essential to develop strong, credible methodologies that will assist in assessing and strengthening the capacity of

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<sup>27</sup> For example, the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) (and related Bills) were introduced as the Howard Government's legislative response to the 11 September 2001 terrorist attack on the United States; and the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) was introduced in response to the threat posed by Australians engaged in terrorist activity overseas.

<sup>28</sup> For example, the Anti-Terrorism Bill (No 2) 2005 (Cth) introduced a system of control orders and preventative detention orders available to law enforcement officers; and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 introduced questioning and detention powers for ASIO officers.

<sup>29</sup> Department of Prime Minister and Cabinet, *Independent Intelligence Review* (2017). See also David Omand, *Securing the State* (Hart Publishing, 2010).

legislatures to protect rights and in assessing the need for other institutions to supplement or oversee legislatures in carrying out this role.<sup>30</sup>

In order to maximise the potential for my findings to have broader application, I have chosen Acts with a diversity of content and contextual background. For example, many of the Acts studied attracted the scrutiny of multiple parliamentary committees despite short time frames between introduction and enactment.<sup>31</sup> Many of these Acts also attracted large numbers of public submissions, gave rise to multiple days of public hearings and generated large numbers of second reading speeches in Parliament. Other Acts in the case study reflect longer-term efforts to review and reform Australia's counter-terrorism framework, to improve its effectiveness, or to improve its rights compliance.<sup>32</sup> The case study Acts also include examples of proposed laws that are more technical in character, which attract less public attention, but still undergo robust parliamentary scrutiny and substantive legislative change.<sup>33</sup> This diversity of scrutiny experiences contributes to the strength of this case study for examining the work of parliamentary committees.

I have also employed a range of methodological strategies to ensure that the exceptional legal and socio-political character of my case study does not unduly restrict the broader applicability of my research.<sup>34</sup> For example, my methodology incorporates interview and documentary material that contains reflections on the workings of the committee system more broadly, not just limited to the counter-terrorism experience. In addition, Part III sets out a range of recommendations designed to facilitate further research to confirm the broader applicability of the findings made in this thesis.<sup>35</sup>

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<sup>30</sup> Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', 569 above n 24.

<sup>31</sup> See, eg, *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth); *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth); *Anti-Terrorism Act (No 2) 2005* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (Cth); *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (and related Acts).

<sup>32</sup> See, eg, *National Security Legislation Amendment Act 2010* (Cth); *Independent National Security Legislation Monitor Act 2010* (Cth).

<sup>33</sup> See, eg, *National Security Information (Criminal Proceedings) Act 2004* (Cth); *Anti-terrorism Act 2004* (Cth).

<sup>34</sup> These strategies are outlined in further detail in Chapter 2.

<sup>35</sup> See in particular Chapter 9 and Table 9.1.

### 3 What 'Rights' Are Considered in This thesis?

My research focuses on the rights-enhancing impact of parliamentary committees. I use the term 'rights' inclusively to span those human rights recognised under the international conventions to which Australia is a party, such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights*.<sup>36</sup> It also includes those rights recognised under the *Constitution*<sup>37</sup> and the common law. This is important because, as will be discussed further in Part II, the Australian Parliament uses a range of language to describe individual rights and freedoms, some of which draws on common law and constitutional concepts. These articulations of rights form part of what Spigelman has described as the Common Law Bill of Rights.<sup>38</sup> They commonly include:

- legal professional privilege;
- the privilege against self-incrimination;
- the right to access legal counsel when accused of a serious crime;
- the right to procedural fairness when affected by the exercise of public power;

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<sup>36</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, [1976] ATS 5.

<sup>37</sup> These constitutional rights include: the implied freedom of communication, see, eg, *Australian Capital Television v Commonwealth* (1992) 1777 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 250; the right to vote and equality of voting power, see *Constitution* ss 7, 24, 41; religious rights, see *Constitution* ss 116, 117; *Street v Queensland Bar Association* (1989) 168 CLR 461; economic rights such as the right to be compensated for the acquisition of property, see *Constitution* s 51(xxxi); *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; and the right to trial by jury, see *Constitution* s 80; *Cole v Whitfield* (1988) 165 CLR 360. For commentary on and analysis of the nature of these rights see David Hume and George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013).

<sup>38</sup> James Spigelman, 'The Common Law Bill of Rights' (Speech delivered at the University of Queensland, Brisbane, 10 March 2008). See also Robert French, 'The Common Law and the Protection of Human Rights' (Speech delivered at the Anglo-Australasian Lawyers Society, Sydney, 4 September 2009) 2; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17. The Common Law Bill of Rights is also reflected in what the previous Attorney-General Brandis describes as 'traditional rights and freedoms'. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016). See also George Brandis, 'New Australian Law Reform Inquiry to Focus on Freedoms' (Media Release, 11 December 2013) <[http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013\\_NewAustralianLawReformInquiryToFocusOnFreedoms.aspx](http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013_NewAustralianLawReformInquiryToFocusOnFreedoms.aspx)>.

- freedom from retrospective operation of criminal laws; and
- the principle that the prosecution should bear the onus of proof in criminal matters.

A similar list of rights is regularly included in the ‘principle of legality’, which can be applied by the courts as a tool for interpreting ambiguous legislation.<sup>39</sup>

In this thesis I also use the phrase ‘rule of law’, a phrase that is commonplace in Australian political and legal discourse, but one rarely clearly articulated or unpacked into discrete, accessible components.<sup>40</sup> In more modern times, the notion of ‘rule of law’ generally contains the following key features:

No one should be above the law, and all are equal before it, whatever their position or standing.

All public officials should be subject to the law, and act within the terms of legally prescribed duties, powers and procedures.

Parliamentary law-making should conform to constitutionally defined procedures and limits.

The judiciary should be clearly independent of both executive and parliament in order to interpret and enforce the law without fear or favour.

All law should be certain and its provision and penalties known in advance.

No one should be held or punished without a specific charge and a fair hearing before a duly constituted court.<sup>41</sup>

As will be discussed further below,<sup>42</sup> cultural familiarity with this notion of the rule of law has infused the way Australian parliamentarians talk about individual rights and liberties, and the

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<sup>39</sup> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523; *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). For commentary on this principle see James Spigelman, ‘The Principle of Legality and the Clear Statement Principle’ (2005) 79 *Australian Law Journal* 769, 775; Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37 *Melbourne University Law Review* 372, 373; Dan Meagher and Matthew Groves (eds), *The principle of legality in Australia and New Zealand* (Federation Press, 2017). For further commentary on the relationship between the principle of legality, the parliament and the courts see Dan Westbury, ‘The Principle of Legality as a Reflection of the Constitutional Relationship between Parliament and the Courts’ on AUSPUBLAW (19 February 2018) <<https://auspublaw.org/2018/2/the-principle-of-legality>.

<sup>40</sup> Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1959) 187–8, 193, 195.

<sup>41</sup> Marian Sawyer, Norman Abjorensen and Phil Larkin, *Australia: The State of Democracy* (Federation Press, 2009) 25.

<sup>42</sup> See in particular Chapter 6, Section C and Chapter 9.



types of rights issues they focus on most closely when undertaking their scrutiny role. Parliamentary committees remain heavily influenced by this notion of the rule of law, as is evident both in the language used and findings made by the committees examined below. Rule of law principles also feature prominently in the prescribed terms of reference for a number of scrutiny committees, including the SSCSB.

## B *Parliamentary Committees and Rights Protection in Australia*

At the federal level Australia has an ‘exclusively’ parliamentary model of rights protection,<sup>43</sup> which exists within a constitutional framework that limits the law-making powers of the Commonwealth, but is in sharp contrast to most other Western nations which have constitutional or statutory bills of rights. In other words, Australia recognises the Parliament as the *only* legitimate arbiter of human rights. The judicial contribution to the conversation on rights is restricted to the resolution of particular disputes, the application of established rules of statutory interpretation,<sup>44</sup> and the determination of a more limited range of constitutional or common law rights.<sup>45</sup> While these constitutional and common law rights may cross over with the list of rights contained in international human rights instruments, they are nonetheless considered quite separate in both a legal and normative sense. As Davis observes:

[A]n historic commitment to parliamentary sovereignty has resulted in the Federal Parliament rejecting judicial oversight of human rights. Instead Australia has a firm commitment to political rights review. Federal Parliament is empowered ... to act as the sole body responsible for the scrutiny of legislation to ensure compliance with human rights standards.<sup>46</sup>

Parliamentary committees – whether specifically assigned a rights-protecting role, or performing another scrutiny or inquiry function – are central to this parliamentary model as they provide the most practical forum for detailed consideration of the purpose, content and

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<sup>43</sup> Williams and Burton, ‘Australia’s Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection’, above n 16.

<sup>44</sup> These include the common law principle of legality (discussed above n 38) and the presumption of compliance with treaty obligations, see *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, [26] (Mason CJ and Deane J).

<sup>45</sup> See, eg, those rights listed above n 37.

<sup>46</sup> Fergal F Davis, ‘Political Rights Review and Political Party Cohesion’ (2016) 69 *Parliamentary Affairs* 213, 213–14.

rights impact of proposed new laws. They also provide a source of concrete recommendations for legislative or policy change that regularly have the effect of improving the rights compliance of proposed federal laws. For these reasons, studying the impact of parliamentary committees is a useful way to evaluate how the parliamentary model of rights protection works in practice.

### C *Scepticism About the Parliamentary Model of Rights Protection*

While Australia's human rights record is relatively strong from an international perspective,<sup>47</sup> many rights advocates in Australia and elsewhere have expressed scepticism about the extent to which parliamentary committees can have a rights-enhancing impact on the development and content of laws and question the capacity of a parliamentary model of rights protection to deliver meaningful rights outcomes.<sup>48</sup>

At the heart of this scepticism is the fact that the parliamentary model of rights protection depends largely on the executive, via the Parliament, determining rights disputes and addressing gaps in rights protection. In practice, the executive government can be focused strongly on electoral outcomes, and may be particularly poor at promoting and protecting the rights of unpopular minorities.<sup>49</sup> According to this argument, parliamentary committees, public servants and human rights commissions cannot hope to exert the type of political influence necessary to control the executive government, and thus constitute weak forms of rights protection. For example, Debeljak explains that, under the current parliamentary model, there is an 'under-enforcement' of rights at the federal level and 'aggrieved persons and groups are denied an effective rights-focussed, non-majoritarian forum within which their human rights claims can be assessed'.<sup>50</sup>

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<sup>47</sup> See, eg, Melissa Castan and Paula Gerber, 'Human Rights Landscape in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights in Australia* (Lawbook Co, 2013) 1, 15.

<sup>48</sup> See authors listed above n 4. See also Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights in Australia* (Lawbook Co, 2013) 37.

<sup>49</sup> See, eg, Hilary Charlesworth, 'Democratic objections to bills of rights' (2008) 20(3) *Sydney Papers* 124, 127; see also Hilary Charlesworth, *Writing in rights: Australia and the protection of human rights* (UNSW Press, 2002) 74–5.

<sup>50</sup> Debeljak, 'Does Australia Need a Bill of Rights?', above n 48, 57.

This has led many scholars to call for broader structural reform at the federal level that would see the judiciary invested with an explicit rights-protecting or rights-oversight role.<sup>51</sup> In other words, many rights advocates want to move from the current model, where Parliament has a monopoly on rights protection, to one where each branch of government is involved in ‘institutional dialogue’ about the content, scope and limits of human rights.<sup>52</sup> This push for reform has also been reflected in community views, including during the 2008–09 National Consultation on Human Rights (the National Consultation), which recorded that:

Most of the people who attended the community roundtables and presented written submissions to the [National Consultation] Committee wanted to see greater protection and promotion of human rights and responsibilities. Only a minority believed that our current protections are adequate.<sup>53</sup>

Rights advocates in favour of structural reform at the federal level have often been divided on whether a constitutional or statutory statement of rights is preferable, depending on whether they support the courts or the Parliament having the final say on rights disputes or the rights compatibility of laws. For example, those that prefer the constitutionally entrenched model argue that giving the courts the final say on the rights compatibility of a law is the only way to successfully guard against unjustified legislative or executive interference with fundamental rights, particularly those of minorities.<sup>54</sup> In contrast, those in favour of the statutory model<sup>55</sup>

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<sup>51</sup> See, eg, Alexander Williams and George Williams, ‘The British Bill of Rights Debate: Lessons from Australia’ (2016) *Public Law* 471; Daniel Reynolds and George Williams, *A Charter of Rights for Australia* (NewSouth Books, 4th ed 2017); Megan Davis and George Williams, ‘A Statutory Bill of Rights for Australia? Lessons from the United Kingdom’ (2002) 22(1) *University of Queensland Law Journal* 1; Pamela Tate, ‘Human Rights in Australia: What Would a Federal Charter of Rights Look Like?’ (2009) 13 *Southern Cross University Law Review* 1; George Williams, ‘Constructing a Community-Based Bill of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 247; George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (University of New South Wales Press, 2004); George Williams, *A Charter of Rights for Australia* (University of New South Wales Press, 2007); Hilary Charlesworth, ‘Who Wins Under a Bill of Rights?’ (2006) 25 *University of Queensland Law Journal* 39; Debeljak, ‘Does Australia Need a Bill of Rights?’, above n 48.

<sup>52</sup> Debeljak, ‘Does Australia Need a Bill of Rights?’, above n 8, 59.

<sup>53</sup> Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 15. See also Castan and Gerber, above n 7, 1.

<sup>54</sup> See, eg, B Burdekin, ‘Foreword’ in P Alston (ed), *Towards an Australian Bill of Rights* (Australian National University, 1994) v.

<sup>55</sup> See Jeremy Webber, ‘A Modest (but Robust) Defence of Statutory Bills of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone, *Protecting Rights without A Bill of Rights* (Ashgate, 2006), 276, 266; P Alston (ed), *Towards an Australian Bill of Rights* (Australian National University, 1994) 88, 93; Charlesworth, *Writing*

often describe it as addressing the ‘democratic deficit’ inherent in a constitutional bill of rights because, under many statutory models, the courts have a role in assessing and interpreting the rights compatibility of laws, but the Parliament has the final say on whether rights-intrusive legislative provisions can be enacted.<sup>56</sup> Hiebert also argues that the statutory model ensures that the focus of those involved in policy development is on utilising rights standards to improve the quality of the proposed law, rather than avoiding potential constitutional litigation.<sup>57</sup>

At least until 2010, proposals for statutory statements of rights generated support in a number of Australian jurisdictions and dominated the debate on rights protection at the federal level. A number of unsuccessful efforts were made to introduce human rights Acts at the federal level,<sup>58</sup> and in 2004 the *Human Rights Act* was introduced in the Australian Capital Territory (ACT), followed by the introduction of the Victorian *Charter of Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) in 2006. However, this forward momentum behind the push for a federal human rights Act was stymied by two key events: the first was the decision of the Rudd Government not to implement a federal human rights Act following the National Consultation.<sup>59</sup> The second was the High Court’s decision in *Momcilovic v The Queen* (*Momcilovic*),<sup>60</sup> which involved consideration of a number of key features of the Victorian Charter<sup>61</sup> and sounded a warning for rights advocates keen to implement similar legislation at the federal level. In *Momcilovic*, the majority of the High Court upheld the constitutional validity of the relevant provisions of the Victorian Charter, but took a conservative approach

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*in rights*, above n 49, 73–4; Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 74.

<sup>56</sup> George Williams and Lisa Burton, ‘Australia’s Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection’ in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 257; Webber, above n 55, 276, 275.

<sup>57</sup> Janet Hiebert, ‘Parliamentary Engagement with the Charter’ (2012) 58 *Supreme Court Law Review* 87.

<sup>58</sup> See e.g. See George Williams, ‘The Federal Parliament and the Protection of Human Rights’ (Parliamentary Research Paper No 20 of 1998-99, Parliamentary Library, Parliament of Australia, 11 May 1999). See also George Williams, *A Bill of Rights for Australia* (UNSW Press, 2000); Chappell, Chesterman and Hill, above n 555, 72-73.

<sup>59</sup> Human Rights Consultation Committee, *National Human Rights Consultation Report*, above n 533.

<sup>60</sup> (2011) 245 CLR 1.

<sup>61</sup> For example, the High Court considered the validity of ss 7(2) (the ‘reasonable limits’ provision), 32 (the ‘interpretive obligation’ provision) and 36 (the ‘declaration of incompatibility provision’) of the *Charter of Rights and Responsibilities Act 2006* (Vic).

to the courts' role in relying upon these provisions to 'remedy' rights-infringing laws, and displayed a clear deference to Parliament when it comes to interpreting statutory provisions.<sup>62</sup> Debeljak has described the *Momcilovic* decision as sanctioning a 'rights-reductionist method to the statute-related Charter mechanisms' and 'muting' the institutional dialogue between the courts and the legislature, particularly in so far as it limits the remedial reach of the obligation in the Charter to interpret statutory provisions in a manner consistent with international human rights.<sup>63</sup> Other commentators agree that the High Court's decision is likely to have a restrictive impact on the design of any future statutory model of rights protection in Australia.<sup>64</sup>

In light of this stalled momentum behind the push for a federal human rights Act, many rights advocates have turned their focus to the package of reforms introduced by the Rudd Government in response to the National Consultation, including the establishment of the Parliamentary Joint Committee on Human Rights (PJCHR).<sup>65</sup> Many hoped that the PJCHR, and related mechanisms such as the requirement to introduce laws with statements of rights compatibility, would help overcome some of the weaknesses identified in past studies of the parliamentary model of rights protection at the federal level.<sup>66</sup> However, a number of early studies of the PJCHR and the requirement to table Statements of Compatibility (SoCs) suggest

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<sup>62</sup> The High Court's decision in *Momcilovic v The Queen* (2011) 245 CLR 1 is complex, with differently constituted majorities forming on the different questions of validity relating to the Victorian Charter. For example, five justices upheld the validity of s 32(1) of the Victorian Charter (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); however, their views differed on how this provision should interact with the 'reasonable limitations' provision in s 7(2). Four justices upheld the validity of the declaration provision in s 36 of the Victorian Charter (French CJ, with whom Bell J agreed on this point, Crennan and Kiefel JJ). However, the declaration made by the Victorian Court of Appeal in this case was set aside. For an analysis of this decision see Julie Debeljak, 'Who is Sovereign Now? The Momcilovic Court Hands Back Power Over Human Rights that Parliament Intended it to have' (2011) 22(1) *Public Law Review* 15; Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian Charter of Human Rights and Responsibilities: The Momcilovic Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340; Victorian Government Solicitors Office, *Case Note: Momcilovic v The Queen* (September 2011).

<sup>63</sup> Debeljak, 'Who is Sovereign Now?', above n 62.

<sup>64</sup> See, eg, Suzanne Zhou, 'Momcilovic v. the Queen: Implications for a Federal Human Rights Charter' (Working Paper, Social Science Research Network, 2012) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2128005](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128005)>; Will Bateman and James Stellios 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1.

<sup>65</sup> These reforms were introduced by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). For examples of analysis of the PJCHR see Fletcher, above n 16; Williams and Reynolds, above n 16; Campbell and Morris, above n 16.

<sup>66</sup> These past studies include Evans and Evans, 'Australian Parliaments and the Protection of Human Rights', above n 4.

that these reforms have largely failed to live up to expectations.<sup>67</sup> For example, in their 2016 study of the post-PJCHR parliamentary model of rights protection,<sup>68</sup> Williams and Reynolds found that, when it comes to improving the content of proposed laws, the PJCHR's findings had a minimal impact.<sup>69</sup> The authors also found that the PJCHR's 'deliberative impact' on rights protection in Australia was also minimal, reflecting a 'slow improvement from a low base', and that much of this improvement was attributable to a 'few outspoken advocates for the human rights scrutiny regime'.<sup>70</sup> The authors also found that judicial use of the scrutiny regime has been extremely limited<sup>71</sup> and that '[p]ublic awareness of the scrutiny regime appears to be low'.<sup>72</sup> The authors observed that:

[I]n a system in which Parliament, or at least the lower house, remains weak with respect to the executive, it is hard to see any parliamentary based scheme for human rights protection producing major alterations to executive proposals for new laws. It is simply not realistic in such a system to expect that a parliamentary scrutiny regime will overcome the power imbalance between these two arms of government.

In addition, in the absence of independent judicial supervision of Parliament's work, the incentives to comply with the regime are few.<sup>73</sup>

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<sup>67</sup> See, eg, Fletcher, above n 16; Williams and Reynolds, above n 16; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046; Reynolds and Williams, *A Charter of Rights for Australia*, above n 51; Williams and Williams, 'The British Bill of Rights Debate: Lessons from Australia', above n 51; Reynolds and Williams, *A Charter of Rights for Australia* above n 51; George Williams, 'Scrutiny of Primary Legislation Principles and Challenges: Where are We Now and Where are We Headed?' *Australia-New Zealand Scrutiny of Legislation Conference*, Parliament House, Perth, 12 July 2016; For an alternative view, see Campbell and Morris, above n 16. Campbell and Morris analysed the first few years of the PJCHR's operation in 2015, concluding that 'there are grounds for optimism concerning its contribution as a human rights mechanism of a type which is suited to articulating and implementing human rights in democratic polities' at 7.

<sup>68</sup> Williams and Reynolds, above n 16, 472. The authors examined whether the new regime: improves engagement and debate among parliamentarians about the human rights issues raised by proposed laws (the 'deliberative impact'); improves the quality of legislation from a human rights perspective, such as by leading to legislative amendments or retractions of rights-infringing Bills (the 'legislative impact'); promotes broader community awareness and understanding of human rights issues in regard to proposed laws (the 'media impact'); and succeeds in not giving rise to additional litigation or powers to judges in respect of human rights (the 'judicial impact').

<sup>69</sup> *Ibid* 490.

<sup>70</sup> *Ibid* 488.

<sup>71</sup> *Ibid* 494–5.

<sup>72</sup> *Ibid* 496–7.

<sup>73</sup> *Ibid* 507.

These findings echo earlier warnings<sup>74</sup> about the limits of Australia's parliamentary model of rights protection.<sup>75</sup> This experience has also solidified the scepticism of many rights advocates about the capacity of the parliamentary model to deliver real rights outcomes for Australians. As will be discussed below, my research challenges a number of findings made in these studies, and suggests that there is value in overcoming this scepticism at least when it comes to understanding the rights-enhancing impact of the parliamentary committee system.

#### D *Overcoming Scepticism About the Parliamentary Model of Rights Protection*

As noted above, when commencing this research I shared the views of many of the scholars discussed above. The rights-abrogating content and operation of many federal laws, including counter-terrorism laws,<sup>76</sup> seemed proof enough that the parliamentary model of rights protection simply was not working, and would be nearly impossible to fix. However, after undertaking a careful analysis of the three tiers of impact parliamentary committees have had on the development of Australia's counter-terrorism laws, and listening to those with direct experience working within the committee system, I changed my view. It became clear that individual committees have had a significant rights-enhancing (although rarely rights-

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<sup>74</sup> This view was also reflected in some of the interview material obtained for this thesis. See, eg, Interview with Penny Wright, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee, former Australian Greens Senator for South Australia (Adelaide, 11 August 2016).

<sup>75</sup> See, eg, Williams and Reynolds, above n 16, 469; Michael Palfrey, 'A new federal scheme for the protection of human rights' (2012) 69 *Australian Institute of Administrative Law Forum* 13; Edward Santow, 'The Act that dares not speak its name: the National Human Rights Consultation report's parallel roads to human rights reform' (2010) 33(1) *University of New South Wales Law Journal* 8; Stellios and Palfrey, above n 4; Janet L Hiebert, 'Governing Like Judges?' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 40, 63.

<sup>76</sup> The rights-abrogating features of Australia's counter-terrorism laws have been well documented since 2001. See, eg, Andrew Lynch, 'Legislating with Urgency – the Enactment of the Anti-Terrorism Act (No 1) 2005' (2006) 30(3) *Melbourne University Law Review* 747; Andrew Lynch and Nicola McGarrity, 'Counter-terrorism Laws: How Neutral Laws Create Fear and Anxiety in Australia's Muslim Communities' (2008) 33(4) *Alternative Law Journal* 225; Appleby, 'The 2014 Counter-terrorism Reforms in Review', above n 10; George Williams, 'Ten Years of Anti-terror Laws in Australia' (2012) 112 *Precedent* 9; George Williams, 'The Legal Assault on Australian Democracy: the Annual Blackburn Lecture' (2015) 236 *Ethos* 18; Jenny Hocking, *Terror laws: ASIO, counter-terrorism and the threat to democracy* (University of New South Wales Press, 2004); John Uhr, 'Parliamentary Measures: Evaluating Parliament's Policy Role' in Ian Marsh (ed), *Governing in the 1990s: An agenda for the decade* (CEDA/Longman, 1993) 347; Janet L Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68(4) *Modern Law Review* 676; Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tullich, T, Anaian-Welsh R, Bronitt S and Murray S (eds) *Regulating Preventative Justice: Principle, Policy and Paradox* (Routledge, 2017) 136; Reynolds and Williams, *A Charter of Rights for Australia*, above n 51.

remedying) impact on these laws and, more interestingly, when multiple committees worked together this impact was stronger and longer lasting. It also became clear that the way parliamentary committees operate (including how they engage key participants and the way they talk about rights) is making a discernible contribution to Australia's parliamentary model of rights protection.

My analysis directly challenges findings made by past studies of Australian parliamentary committees and rights protection or, at the very least, presents a different picture of their overall rights-enhancing impact. For example, unlike the 2006 findings made by Evans and Evans,<sup>77</sup> Part II of the thesis presents evidence that the scrutiny criteria applied by some parliamentary committees are deeply entrenched in policy making and parliamentary drafting practice, and that this has tangible rights-enhancing results. It also finds that some committees have the capacity to make a long-term contribution to the development of proposed laws, and provide a deliberative forum to debate rights-related issues. This thesis also documents instances of consistently strong rights-enhancing legislative impact by particular committees in the system. Key among my findings is that, when different committees work together as a system, the rights-enhancing impacts can be particularly strong. This suggests that, rather than looking exclusively at the rights-protecting capacity of one committee, such as the PJCHR, many committees in the system may be well placed to play an active role in rights protection.

These findings are important as they point to the need to carefully consider the parliamentary committee system when evaluating options for improving rights protection in Australia. They also highlight the merit in some of the arguments made by scholars who claim that the existing parliamentary model of rights protection has distinct advantages over constitutionally entrenched or statutory enshrined charters of rights.<sup>78</sup> For example, prior to the introduction of the PJCHR, Campbell advocated the establishment of a 'democratic' human rights committee at the federal level, with wide-ranging inquiry powers and the capacity to proactively generate rights-protecting legislation, in addition to the power to scrutinise proposed laws for

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<sup>77</sup> Evans and Evans, 'Australian Parliaments and the Protection of Human Rights', above n 4.

<sup>78</sup> See, eg, Jeffrey Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 69; Adrienne Stone 'The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 391. See also Chappell, Chesterman and Hill, above n 55, 67–9.



compliance with human rights standards.<sup>79</sup> Such a committee would have constitutional backing, not in the form of a prescribed bill of rights, but to entrench its place in the Parliament and preserve its procedural integrity, regardless of the views of the executive government.<sup>80</sup> The rights standards to be applied by such a committee would be generated by the committee itself and popularly endorsed.<sup>81</sup> The proposed committee would also have the power to delay legislation to ensure that human rights considerations are addressed and to require rights-protecting legislation to be brought forward within a specific time frame.<sup>82</sup> While the proposed committee would have no power to block legislation, it would be able to require ministers to respond to its requests for information, call witnesses, conduct inquiries and obtain expert advice.<sup>83</sup> For Campbell, a committee-based approach to rights protection, where the rights standards to be applied are generated and articulated by the committee itself, ‘avoids overly legalistic formulations of rights’ and gives rise to ‘superior democratic legitimacy’ than other models of rights protection.<sup>84</sup>

While my recommendations depart from those made by Campbell in important respects,<sup>85</sup> my findings on the role parliamentary committees can play in enhancing the deliberative quality<sup>86</sup> of the law-making process align with many of Campbell’s arguments. In particular, the findings in Part II demonstrate the ways in which the parliamentary committee system aims to resolve difficult decisions about ‘balancing rights’<sup>87</sup> and to encourage public participation in rights

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<sup>79</sup> Tom Campbell, ‘Human Rights Strategies: An Australian Alternative’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006) 319, 333.

<sup>80</sup> Ibid 333–4. For further discussion of this feature of Campbell’s proposal see Adrienne Stone, ‘Tom Campbell’s Proposal for a Democratic Bill of Rights’ (Legal Studies Research Paper No 495, University of Melbourne, 2009).

<sup>81</sup> Campbell, above n 79, 334.

<sup>82</sup> Ibid.

<sup>83</sup> Campbell, above n 79, 334–5.

<sup>84</sup> Ibid 336–7.

<sup>85</sup> See discussion in Chapter 10, in particular, Table 10.4.

<sup>86</sup> For discussion of the relationship between deliberative democracy and the law making process see Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016). In their work, Orr and Levy focus on what they call ‘second order’ issues arising from deliberative democracy, including the design of the electoral system, rather than the work of parliamentary committees, however as discussed further in Chapter 4, some of their findings have relevance in the context of parliamentary committees.

<sup>87</sup> See, eg, Greg Craven, *Conversations with the Constitution: not just a piece of paper* (Sydney University Press, 2004) 173; Campbell, above n 80, 326–7; James Allan, ‘Oh That I Were Made Judge in the Land’ (2002) 30(3) *Federal Law Review* 566. Cf Levy and Orr, *ibid*, 76–80 who discuss public decision making with reference to ‘conceptual balancing’ (which often takes the form of trading off values or interests against others) and

discussions.<sup>88</sup> The material I present in Part II suggests that often alternative, less rights-intrusive options are identified through committee processes that are later adopted as successful legislative amendments to proposed laws. This suggests that the way rights issues are debated between the executive and the Parliament can be nuanced and meaningful, even in the context of strong bipartisan support for ‘tough on terror’ policies. As discussed further in Part III,<sup>89</sup> this organically developing dialogue may have advantages over other rights-protecting models where the judiciary enters this dialogue in a more explicit way, such as under statutory or constitutional models where the courts declare a law to be inconsistent with a list of protected rights without offering policy alternatives.

In this way, my findings share similarities with scholars such as Kinley, who support models of rights protection that focus on developing a culture of rights compliance at the pre-legislative phase, rather than rights-protection models that include remedial, post-introduction judicial determination of rights disputes.<sup>90</sup> For Kinley, these pre-legislative scrutiny models of rights protection are preferable because they are more ‘democratic’ than constitutional or statutory charters of rights: they work to exert ‘electoral pressure in respect of unacceptable legislation, where the electorate is aware of such legislation and cognizant of its impact on human rights’.<sup>91</sup> Morris and Campbell share this perspective, as is evident from their 2015 evaluation of the

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‘deliberative accommodation’ (which often involves searching for a common ground between different values or interests).

<sup>88</sup> See, eg, Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006). Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretative Disagreement’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2006). See also James Allan, ‘A Defence of the Status Quo’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 173, 176; Brian Galligan and F L Morton, ‘Australian Exceptionalism: Rights Protection Without a Bill of Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, 2003) 19. This view is shared by a number of parliamentarians, including former Attorney-General Brandis, who at the time of the National Consultation supported the establishment of a new human rights committee over the introduction of a Charter of Rights. See George Brandis, Submission by the Federal Opposition to the National Human Rights Committee, *National Human Rights Consultation* (2009); see also Michael Tate, Submission to the National Human Rights Committee, *National Human Rights Consultation* (2009). See also Human Rights Consultation Committee, *National Human Rights Consultation Report*, above n 53.

<sup>89</sup> See in particular Chapters 9 and 11.

<sup>90</sup> See David Kinley, ‘Parliamentary Scrutiny of Human Rights: A Duty Neglected’ in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999) 158; Kinley and Ernst, above n 4, 69.

<sup>91</sup> Kinley, above n 90, 162.

PJCHR, where the authors found that during its first few years of operation the PJCHR had ‘improved Australia’s human rights institutional performance’ and provided ‘significant opportunities for political leaders, parliamentary members, political parties and their public supporters to contribute effectively to the enhancement of Australia’s democratic human rights framework’.<sup>92</sup> My research builds upon this finding by suggesting that when parliamentary committees, including the PJCHR, work together as a system their capacity to contribute to a pre-legislative culture of rights compliance at the federal level is considerably enhanced.

My research can also be considered within the analytical framework of ‘multi-stage rights review’ employed by Stephenson in his comparative analysis of different common law jurisdictions’ approaches to rights protection.<sup>93</sup> Unlike many other scholars, Stephenson rejects the idea of analysing models of rights protection with reference to institutional *dialogue* on rights (where the system is categorised as either one of legislative supremacy or judicial supremacy) in favour of focusing on the direct and indirect *disagreements* that occur between different institutions of government on rights issues (where systems are understood as involving multiple stages of rights review by different institutions of government).<sup>94</sup> This approach helps to reveal similarities and differences across models of rights protection that may not be visible under the ‘dialogue’ approach. For example, applying the ‘dialogue’ analytical approach to the Australian federal experience, the Parliament (and not the courts) has the final say on rights issues or rights-abrogating laws. However, this can mask the contribution other branches of government may make along the way to the final resolution of the rights issue by Parliament. As Stephenson explains:

A legislature that resolves rights issues in an informal manner with little interference from other institutions is in a markedly different position from a legislature that resolves rights issues only after the executive, a specialist legislative committee and the courts have offered their views and placed pressure on the legislature to heed them.<sup>95</sup>

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<sup>92</sup> Campbell and Morris, above n 16, 27.

<sup>93</sup> Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016). See also Robert French, ‘Foreword’ in Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) viiii.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid 5.

Stephenson's approach highlights the importance of identifying and analysing both *direct* and *indirect* inter-institutional disagreement on rights that occur in different jurisdictions.<sup>96</sup> Although, like other scholars, I continue to describe the Australian model of rights protection as 'parliamentary', my research helps to illustrate the multi-stage rights review that occurs at the federal level, by documenting the important direct and indirect contribution parliamentary committees make to resolving rights issues within this system. In addition, my research provides an example of some of the 'points of tension between forms of institutional disagreement' that Stephenson discusses in his comparative analysis.<sup>97</sup> For example, the analysis undertaken in Part II of my research exposes how the bureaucracy anticipates rights scrutiny when providing advice to Ministers, and how the rights-intrusive nature of proposed provisions can be removed by the legislative implementation of recommendations made by parliamentary committees. Like Stephenson, my research suggests that these tensions between or within the institutions of government on rights issues provide an *opportunity* for improving the quality of rights review in Australia, rather than pointing to a fundamental flaw in the rights dialogue between these institutions.<sup>98</sup>

This more nuanced approach to analysing the way institutions of government engage in rights review also provides an important context for examining whether a particular rights-scrutiny culture may exist within a particular jurisdiction, which in turn has important implications for what types of rights reforms may be accepted or rejected by that culture. For example, the material set out in Part III suggests that there are a range of common rights-scrutiny principles that appear to be consistently applied by the federal Parliament and the public service when formulating and scrutinising counter-terrorism laws that may have application beyond the case study examined in this thesis. If substantiated by further research, this emerging rights-scrutiny culture may be particularly important for those seeking to articulate an Australian list or statement of rights or for those seeking to engage the full range of political decision makers in rights protection. In summary, by focusing on the way multiple committees work together as a system, my research explores the Australian parliamentary model of rights protection in a deep

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<sup>96</sup> Ibid 6–7.

<sup>97</sup> Ibid 11–12.

<sup>98</sup> Ibid 210–19.

and nuanced way, and reveals important new perspectives on the current and future capacity of this model to deliver meaningful rights protection at the federal level.

I want to be clear that the findings made in this thesis do not obviate the need to consider other rights-protecting mechanisms at the federal level. Indeed, the rights-abrogating content of Australia's counter-terrorism laws is a stark reminder that the current system is not producing consistent rights-protecting results. A number of domestic and international scholars have undertaken detailed analysis of the extent to which Australia's counter-terrorism laws comply with the international human rights obligations Australia has voluntarily assumed, and the principles of established Australian criminal or constitutional law.<sup>99</sup> These scholars have overwhelmingly found Australia's counter-terrorism laws to be non-compliant with a large range of these rights and principles.<sup>100</sup> In addition, scholars such as Williams, Golder, Joseph and Zifcak have compared Australia's counter-terrorism laws to those in comparative jurisdictions, such as the United Kingdom (UK), New Zealand (NZ) and Canada, and found that Australia's counter-terrorism framework is broader in scope<sup>101</sup> and more rights-

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<sup>99</sup> See, eg, Martin Scheinin, Special Rapporteur, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance While Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (14 December 2006); Hocking, above n 76; Andrew Lynch, Edwina McDonald and George Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007); Christopher Michaelsen, 'Balancing Liberties Against National Security? A Critique of Counter-terrorism Rhetoric' (2006) 29(2) *University of New South Wales Law Journal* 1.

<sup>100</sup> See, eg, Kent Roach, *The 9/11 effect: comparative counter-terrorism* (Cambridge University Press, 2011); Diane Otto, 'Protecting human rights and countering terrorism: Australia's contradictory approaches to implementing its international legal obligations' (2010) 44(3) *Valparaiso University Law Review* 911; Liz Curran, 'Human Rights in Australia' (2008) 33 *Alternative Law Journal* 70; Duncan Kerr, 'Australia's Legislative Response to Terrorism' (2004) 29 *Alternative Law Journal* 131; George Williams, 'Anti-Terrorism Laws and Human Rights' (2015) 19 *Review of Constitutional Studies* 127; Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37 *Alternative Law Journal* 166; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code Since September 11, 2001' (2007) 16 *Griffith Law Review* 27; John Von Doussa, 'Reconciling Human Rights and Counter-Terrorism – A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104; Andrew Lynch and Nicola McGarrity, 'Counter-Terrorism Laws' (2008) 33 *Alternative Law Review* 225; Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005' (2007) 10 *Flinders Journal of Law Reform* 81; Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tullich, T, Anaian-Welsh R, Bronitt S and Murray S (eds) *Regulating Preventative Justice: Principle, Policy and Paradox* (Routledge, 2017) 136; Reynolds and Williams, *A Charter of Rights for Australia*, above n 51.

<sup>101</sup> As Kent Roach noted in 2011: 'Australia has exceeded the United Kingdom, the United States, and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11 ... this degree of legislative activism is striking compared even to the United Kingdom's active agenda and much greater than the pace of legislation in the United States or Canada.' Kent Roach, *The 9/11 Effect*, above n 100, 309.

intrusive.<sup>102</sup> For example, as Williams and Burton note, Australia's control order regime<sup>103</sup> is based on a regime introduced in the UK in 2005<sup>104</sup> that was later 'heavily criticised and found to violate the European Convention on Human Rights', including on the basis that it unjustifiably interfered with the right to liberty, the right to a fair trial and freedom from discrimination.<sup>105</sup> The UK control orders regime was abolished in 2011 and replaced with a new regime of terrorism prevention and investigation measures; however, the Australian control order regime remains in force, and has been extended on multiple occasions since 2011.<sup>106</sup> The authors note that this is just one example of an Australian counter-terrorism law with serious rights defects.<sup>107</sup> These scholars demand that Australia do something more than improve its parliamentary committee system if it is serious about protecting rights, pointing to comparable jurisdictions with statutory and constitutional statements of rights, such as the UK, NZ and Canada.<sup>108</sup>

This research has a different focus. It seeks to understand the multi-stage rights protection system currently in place at the federal level, and to identify its strengths and weaknesses. It asks whether or not parliamentary committees have had an impact on the case study Acts and,

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<sup>102</sup> See, eg, Spencer Zifcak, 'Counter-terrorism Laws and Human Rights' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights in Australia* (Lawbook Co, 2013) 418; Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43; Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182; Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428; Cephas Lumina, 'Counter-Terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice' (2007) 7 *African Human Rights Law Journal* 35.

<sup>103</sup> Control orders were introduced in Australia by the *Anti-Terrorism Act (No 2) 2005* (Cth).

<sup>104</sup> *Prevention of Terrorism Act 2005* (UK).

<sup>105</sup> Burton and Williams, 'What Future for Australia's Control Order Regime?', above n 102, 183. See also Ed Bates, 'Anti-terrorism Control Orders: Liberty and Security Still in the Balance' (2009) 29 *Legal Studies* 99, 100; H Fenwick and G Phillipson, 'UK Counter-terror Law Post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms' in V Ramraj, M Hor, K Roach and G Williams (eds), *Global Anti-terrorism Law and Policy* (Cambridge University Press, 2012) 481; Alexander Carlile, *Final Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005 (UK)* (Stationary Office, 2006), 13, 15–16.

<sup>106</sup> See, eg, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth).

<sup>107</sup> For example, the authors also describe the rights-abrogating features of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth): Burton and Williams, 'What Future for Australia's Control Order Regime?', above n 105, 205.

<sup>108</sup> See, eg, authors listed above n 105.

if so, whether this impact was rights-enhancing. In so doing, it seeks evidence-based findings about what is working well, and what reforms could be made to improve the rights-enhancing impact of the parliamentary committee system.

My research also uncovers important features of the rights-scrutiny culture that appear to be organically developing at the federal level, which may have implications for those considering broader structural reform. As Stephenson has noted, each model of rights protection – whether ‘exclusively parliamentary’, statutorily prescribed or constitutionally entrenched – generates its own particular rights-scrutiny culture, and exists within its own particular institutional context.<sup>109</sup> This can make each system resistant to broader structural change, or inclined to revert back to its ‘original’ rights culture even when structural change occurs.<sup>110</sup> My research suggests that there is value in understanding the cultural and contextual features of the current Australian model of rights protection, including by understanding the hidden or behind-the-scenes impact of the parliamentary committee system. As Part III explores, this helps to identify how the rights-enhancing capacity of the committee system can be improved, and highlights what types of considerations should be kept in mind by those advocating more radical reform.

## E *Structure and Overview of Chapters*

This thesis is comprised of three parts. Part I contains three chapters, commencing with this introduction. Chapter 2 sets out the methodology employed in this thesis, introduces the case study Acts and particular committees studied, and analyses the Australian parliamentary landscape in which laws are developed, debated and enacted.

Chapter 2 includes a critical overview of past evaluations of parliamentary committees and describes how the assessment framework<sup>111</sup> used in my research is designed to overcome some

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<sup>109</sup> Stephenson, above n 3, 211. See also Janet Hiebert, ‘Parliamentary Engagement with the Charter’ (2012) 58 *Supreme Court Law Review* 87.

<sup>110</sup> Stephenson, above n 3, 8. See also Hiebert, ‘Parliamentary Engagement with the Charter’, above n 1099.

<sup>111</sup> As discussed in Chapter 2, the assessment framework employed in this thesis draws on a methodology developed by the Dickson Poon School of Law to evaluate rights-scrutiny mechanisms across the common law world. See Philippa Webb and Kirsten Roberts, ‘Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness’ (Paper presented at the Dickson Poon School of Law, King’s College London, University of London, June 2014) <<https://www.kcl.ac.uk/sspp/policy->

of the weaknesses and challenges previously encountered. Chapter 2 explains that the assessment framework seeks to measure three ‘tiers’ of impact:

- *legislative* (focused on whether the content of proposed laws changes as a result of parliamentary committee activity);
- *public* (focused on whether the public and/or parliamentary debate on proposed laws is influenced by the work of parliamentary committees); and
- *hidden* (focused on whether the work of parliamentary committees has an impact on how proposed laws are developed prior to introduction into Parliament).

This framework demands consideration of a range of evidence, including Hansard debates, parliamentary committee reports, public service guidelines and manuals and, perhaps most importantly, direct testimony from those individuals involved in various stages of the parliamentary committee process. When taken together this methodology allows for a holistic insight into the impact of parliamentary committees on the development and enactment of legislation.

Part 1 also recognises the need to have a sound understanding of the legal and political context in which parliamentary committees operate in order to be confident about measuring the type of impact they may be having on the development, debate and enactment of Australia’s counter-terrorism law. Chapter 3 provides an overview of the international and domestic context in which Australia’s counter-terrorism laws and policies have been developed since September 2001.

Part II presents evidence with respect to each component of the assessment framework, allowing findings to be made about the overall impact of parliamentary committees on the case study Acts. Chapter 4 identifies the key *participants* in the four committees studied, and looks for evidence of whether these participants consider these committees to be *legitimate*. The term ‘legitimate’ is discussed further in Chapter 4 and is generally used in this research to denote

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[institute/projects/government/assets/Human-Rights-Policy-DocumentsV5.pdf](#)>. See Chapter 2 for further discussion.



political authority.<sup>112</sup> In other words, a committee that is seen by its key participants as a respected, effective and authoritative part of the federal Parliament would be described as attracting high levels of legitimacy. Understanding the views and perspectives of key participants in the system helps provide a more holistic picture of the nature of the impact each committee has had on the case study Acts. It also helps to set the parameters of realistic options for improving the rights-enhancing impact of each committee, discussed in Part III of the thesis. Chapter 5 sets out evidence of the *legislative impact* of the four parliamentary committees on the case study Acts, providing a powerful indicator of their overall influence. Chapter 6 sets out evidence of the *public impact* of the four parliamentary committees on the case study Acts, including evidence that committees influenced or were considered in public or parliamentary debate or post-enactment review. Chapter 7 considers evidence of the *hidden* or ‘*behind-the-scenes*’ impact of the four parliamentary committees on the case study Acts, including whether or not the work of these committees influenced or was considered in the pre-introduction phase.

Taken together, Part II presents a complex picture where individual committees have particular strengths and weaknesses, and the interaction of committees was critical to the overall strength of their impact on the case study Acts. For example, it demonstrates that some committees, such as the Parliamentary Joint Committee on Intelligence and Security (PJCIS), had a strong impact on the content of proposed counter-terrorism laws, but struggle to be viewed as legitimate by all key participants in the system. Part II also finds that other committees, such as the SSCSB, may have a strong behind-the-scenes impact on legislative development, even if they are rarely able to directly influence parliamentary debates or effect legislative change.

Part II demonstrates that the impact of parliamentary committees on the case study Acts was generally rights-enhancing (and sometimes significantly so), but rarely rights-remedying, as is clear from the rights-infringing content of the enacted laws. In other words, this thesis does not contest the work of scholars such as Williams,<sup>113</sup> McGarrity<sup>114</sup> and Lynch<sup>115</sup> that documents

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<sup>112</sup> Fabienne Peter, ‘Political Legitimacy’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (online, last updated 24 April 2017) <<https://plato.stanford.edu/entries/legitimacy/>>.

<sup>113</sup> See, eg, Williams, ‘The Legal Assault on Australian Democracy’, above n 76; Williams, ‘Ten Years of Anti-Terror Laws in Australia’, above n 766. See also George Williams, ‘Anti-Terrorism Laws and Human Rights’ (2015) 19 *Review of Constitutional Studies* 127.

<sup>114</sup> See, eg, McGarrity, ‘From Terrorism to Bikies’, above n 100.

<sup>115</sup> See, eg, Lynch, ‘Legislating with urgency’, above n 7.

the rights-abrogating features of Australia's counter-terrorism laws. However, it demonstrates that *but for* the work of parliamentary committees, the case study Acts would be *more* rights-intrusive and less compatible with rights standards. Part II also uncovers evidence of an emerging rights-scrutiny culture within the federal Parliament that has a close connection with the work of, and language employed by, parliamentary committees.

Part III of this thesis uses the evidence presented in Part II to substantiate the central claim of this thesis. It argues that only by considering parliamentary committees working together as a system can we propose realistic substantive improvements in the parliamentary model of rights protection. It demonstrates that making changes to the processes, mandates or powers of individual committees provides only limited scope to improve the committee's rights-protecting capacity. Instead, it is the system of parliamentary committees that provides the most realistic and practical options for meaningful, short-term reform. Part III concludes by setting out a range of practical options for improving the capacity of the parliamentary committee system to contribute to rights protection in Australia. Some of the recommendations made in Part III are directed at individual committees, and some at the system as a whole. All aim to:

- encourage multi-committee scrutiny of rights-engaging Bills, draft Bills and discussion papers;
- increase committee resources, address high workloads and ensure timely tabling of reports;
- improve communication and collaboration between individual committees, and between committees and their key participants; and
- acknowledge and document parliamentary committees' contribution to establishing a common rights-scrutiny culture within the Australian Parliament.

These recommendations have the advantage of improving the rights-enhancing capacity of the parliamentary committee system, while also enhancing and solidifying the system's respected and valued place with the Australian Parliament. It is hoped, therefore, that these changes can be implemented without encountering the barriers faced by past recommendations made by scholars of Australia's parliamentary committee system.

## CHAPTER 2: METHODOLOGY

This chapter outlines the challenges identified by scholars when seeking to evaluate the effectiveness of parliamentary committees and articulates the strategies I employed to address these challenges in the assessment framework used in this thesis. The assessment framework used in my research builds upon a framework developed by the Dickson Poon School of Law, and incorporates material obtained through targeted interviews with key participants in the committee system.

### A *Assessing Parliamentary Committees*

As Russell and Benton observe in their work on UK parliamentary committees, ‘much of Parliament’s influence is subtle, largely invisible, and frequently even immeasurable’.<sup>1</sup> Given the complex and dynamic nature of parliamentary committees, evaluating their performance is not always straightforward. It can be difficult to define precisely what a high-performing committee looks like and there is a risk that the assessor’s approach will influence what a ‘good’ committee means.<sup>2</sup> However, these challenges should not diminish the importance of understanding how these committees work, particularly when they have the potential to have a real and significant impact on people’s rights and lives.<sup>3</sup>

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<sup>1</sup> Meg Russell and Meghan Benton, ‘Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches’ (Paper presented at the Public Service Association Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009), cited in Aileen Kavanagh, ‘The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’ in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 111, 131. See also George Williams and Daniel Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ (2016) 41(2) *Monash University Law Review* 469.

<sup>2</sup> Philippa Webb and Kirsten Roberts, ‘Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness’ (Paper presented at the Dickson Poon School of Law, King’s College London, University of London, June 2014) 3 <<https://www.kcl.ac.uk/sspp/policy-institute/projects/government/assets/Human-Rights-Policy-DocumentsV5.pdf>>.

<sup>3</sup> See Phillip Larkin, Andrew Hindmoor and Andrew Kenyon, ‘Assessing the Influence of Select Committees in the UK: The Education and Skills Committee 1997–2005’ (2009) 15(1) *Journal of Legislative Studies* 71.

Many scholars have grappled with these challenges when seeking to evaluate the performance of parliamentary committees in a range of different areas.<sup>4</sup> For example, Alvey has focused on the role of committees in ‘safeguarding the public interest’,<sup>5</sup> Evans and Evans have evaluated committees’ role in rights protection,<sup>6</sup> Halligan has considered the contribution of committees to the development of public policy,<sup>7</sup> Marsh has asked whether committees could or should fill ‘Australia’s representation gap’,<sup>8</sup> Tolley has considered the extent to which committees contribute to more informed parliamentary debate,<sup>9</sup> and Uhr<sup>10</sup> and Dalla-Pozza<sup>11</sup> have investigated the role of committees in enhancing deliberative democracy within the Australian counter-terrorism law-making process.

This thesis aims to learn from these past studies to develop a transparent, methodical approach to assessing the impact parliamentary committees had on the case study Acts. This in turn will

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<sup>4</sup> See, eg, Williams and Reynolds, above n 1, 488. See also Aileen Kavanagh, ‘The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’ in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 111; Meghan Benton and Meg Russell, ‘Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons’ (2013) 66 *Parliamentary Affairs* 772; Gareth Griffith, ‘Parliament and Accountability: The Role of Parliamentary Oversight Committees’ (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); John Halligan, ‘Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level’ (2008) 23(2) *Australasian Parliamentary Review* 135; Janet L Hiebert, ‘Parliamentary Review of Terrorism Measures’ (2005) 68(4) *Modern Law Review* 676; Janet L Hiebert, ‘Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?’ (2006) 4(1) *International Journal of Constitutional Law* 1; Michael C Tolley, ‘Parliamentary Scrutiny of Rights in the United Kingdom: Assessing the Work of the Joint Committee on Human Rights’ (2009) 44(1) *Australian Journal of Political Science* 41; Carolyn Evans and Simon Evans, ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’ (2006) *Public Law* 785; J Smookler, ‘Making a Difference? The Effectiveness of Pre-Legislative Scrutiny’ (2006) 59 *Parliamentary Affairs* 522.

<sup>5</sup> John Alvey, ‘Parliament’s Accountability to the People, The Role of Committees: A Queensland View’ (Speech delivered at the Australian Study of Parliament Group Conference, Parliament House, Adelaide, 23–25 August 2007) 6–7, 26.

<sup>6</sup> Carolyn Evans and Simon Evans, ‘Evaluating the Human Rights Performance of Legislatures’ (2006) 6 *Human Rights Law Review* 546.

<sup>7</sup> Halligan, above n 4.

<sup>8</sup> Ian Marsh, ‘Australia’s Representation Gap: A Role for Parliamentary Committees?’ (Speech delivered at the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 26 November 2004).

<sup>9</sup> Tolley, above n 4.

<sup>10</sup> John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) ch 6.

<sup>11</sup> Dominique Dalla-Pozza, ‘The Conscience of Democracy? The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws’ (Paper presented at the Australasian Law and Society Conference, Wollongong, December 2006) <[www.aspg.org.au/conferences/adelaide2007/Dalla-pozzo.pdf](http://www.aspg.org.au/conferences/adelaide2007/Dalla-pozzo.pdf)>.

help identify the contribution these committees make to Australia's parliamentary model of rights protection.<sup>12</sup>

## B *Challenges Associated with Assessing Parliamentary Committees*

The most commonly identified challenges associated with evaluating parliamentary committees can be summarised as follows:

- difficulties associated with identifying the roles, functions and objectives of a specific parliamentary committee or a system of parliamentary scrutiny;<sup>13</sup>
- the structural dynamics of Australia's executive-dominated Westminster parliamentary system;<sup>14</sup>
- difficulties associated with attributing executive or parliamentary action (such as accepting a recommendation or enacting a legislative amendment) to the work of a parliamentary committee;<sup>15</sup>

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<sup>12</sup> For examples of other evaluations of the role parliamentary committees play in rights protection see Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', above n 4; Griffith, above n 4; Halligan, above n 4; Williams and Reynolds, above n 1; Hiebert, 'Parliamentary Review of Terrorism Measures', above n 4; Hiebert, 'Parliament and the Human Rights Act', above n 4; Tolley, above n 4; Kavanagh, 'The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog', above n 4, 111; Smookler, above n 4; Evans and Evans, 'Legislative scrutiny committees and parliamentary conceptions of human rights', above n 4.

<sup>13</sup> Geoffrey Lindell, 'How (and Whether?) to Evaluate Parliamentary Committees – From a Lawyer's Perspective' (2005) August *About the House* 55; Michael Rush, 'Studies of Parliamentary Reform' (1982) 20(2) *Journal of Commonwealth & Comparative Politics* 138; Gareth Griffith, 'Parliament and Accountability: The Role of Parliamentary Oversight Committees' (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005); Lawrence D Longley and Roger H Davidson, 'Parliamentary committees: Changing perspectives on changing institutions' (1998) 4(1) *Journal of Legislative Studies* 1.

<sup>14</sup> Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39; David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Public Law* 323; David Feldman, 'Democracy, Law and Human Rights: Politics and Challenge and Opportunity' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 95; David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1.

<sup>15</sup> See, eg, Malcolm Aldons, 'Rating the Effectiveness of Parliamentary Committee Reports: The Methodology' (2000) 15(1) *Legislative Studies* 22.

- the need to consider carefully whether all recommendations should be treated equally or whether some have greater or lesser importance;<sup>16</sup> and
- the lack of a clear or consistently applied conceptual framework or methodological approach.<sup>17</sup>

The strategies employed in this thesis to address these challenges are set out below.

## 1 *Addressing the Challenge of Identifying an Agreed Function or Objective of Parliamentary Committees*

Given their dynamic membership and the political context in which they operate, it is not always easy to precisely identify the function or objective of an individual committee, particularly when the functions of the committee may be set out in broad or abstract terms. However, this does not mean that parliamentary committees do not have functions or objectives, or that their effectiveness cannot be measured. Rather, as discussed further below, it requires a careful analytical approach to draw together and distil the central features of the parliamentary committee system, and the specific role each individual committee plays within that system. This is addressed in Chapter 3 of this thesis, which articulates the key features of the Australian Parliament and explains how these features are reflected in the parliamentary committee system. Chapter 3 also traces the history of the development of the four parliamentary committees that form the focus of this research, specifying their particular functions and objectives from the perspective of a range of participants in the committee system, as well as the legal framework for their membership, powers and processes.<sup>18</sup>

## 2 *Addressing the Challenge of Executive Dominance*

Many scholars who examine parliamentary scrutiny mechanisms and parliamentary models of rights protection point to the challenge of overcoming the perceived structural weakness in the Australian Westminster system, derived from the dominance of the executive government over

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<sup>16</sup> Ibid; Monk, above n 14.

<sup>17</sup> Aldons, 'The Methodology', above n 15.

<sup>18</sup> This is complemented by the analysis in Chapter 4 relating to participation and legitimacy.

the legislature.<sup>19</sup> As Feldman explains, governments generally seek to avoid scrutiny because they ‘value the freedom to make policy and to use their party’s majority in the Parliament to give legislative force to it’.<sup>20</sup> This executive control can dominate the outcomes generated by parliamentary committees, particularly when combined with the ‘fact that Australian political parties have some of the strongest party discipline among their Westminster cousins in the UK, Canada and New Zealand’.<sup>21</sup>

In addition, where governments are able to secure bipartisan support for their Bills, which in the federal Parliament is the case with at least 80 per cent of all Bills,<sup>22</sup> the government may see no value in having legislation delayed by formal scrutiny or amendments.<sup>23</sup> This can lead to findings that parliamentary committees in Australia generally enjoy a low level of influence and generate relatively few legislative amendments.<sup>24</sup> It can also lead some to query the viability and desirability of measuring the impact of parliamentary committees at all.<sup>25</sup>

But not all commentators consider Australia’s executive-centric parliamentary landscape to impede the capacity of parliamentary committees to effect change. For example, Longley and Davidson note that it is this potential for the executive to dominate the Parliament that makes the work of parliamentary committees so valuable within the constitutional context.<sup>26</sup> Marsh also argues that parliamentary committees are well placed to fill the ‘representation gap’ that has emerged from Australia’s dominant political party system and an increasingly

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<sup>19</sup> See, eg, Hiebert, ‘Legislative Rights Review: Addressing the Gap Between Ideals and Constraints’, above n 14, 41; Monk, above n 14, 7.

<sup>20</sup> Feldman, above n 14, 98.

<sup>21</sup> John Hirst, ‘A Chance to End the Mindless Allegiance of Party Discipline’, *The Sydney Morning Herald* (Sydney), 25 August 2010; see also Bruce Stone, ‘Size and Executive-Legislative Relations in Australian Parliaments’ (1998) 33(1) *Australian Journal of Political Science* 37.

<sup>22</sup> Bruce Stone, ‘Opposition in Parliamentary Democracies: A Framework For Comparison’ (2014) 29 *Australasian Parliamentary Review* 19.

<sup>23</sup> See, eg, Hiebert, above n 14, 52; Janet Hiebert, ‘Governing Like Judges’ in Tom Campbell (ed), *The Legal Protection of Human Rights: Sceptical Essays* (2011) 40, 60-1.

<sup>24</sup> Williams and Reynolds, above n 1.

<sup>25</sup> Lindell, above n 13, 55.

<sup>26</sup> Lawrence D Longley and Roger H Davidson, ‘Parliamentary committees: Changing perspectives on changing institutions’ (1998) 4(1) *Journal of Legislative Studies* 1, 2.

differentiated and pluralised voting public it seeks (but largely fails) to serve.<sup>27</sup> For other scholars, such as Aldons, the reality of executive dominance of Australian legislatures is of central relevance to evaluations of the effectiveness of parliamentary committees, but is not necessarily evidence of a fatal weakness in the system of parliamentary scrutiny.<sup>28</sup> Rather, it should form part of the institutional context within which the roles and objectives of the parliamentary scrutiny system should be determined.

In my research, I accept the reality of executive-dominated Australian parliaments, but this does not deter my investigation into the impact parliamentary committees have on the development and content of federal laws, or the contribution such committees make to rights protection in Australia. Rather, I seek to factor the executive-centric nature of the Australian landscape into my assessment framework in the following ways:

- (1) outlining the institutional context in which the parliamentary committee system operates and identifying the limitations this may place on the capacity of these committees to influence the content of proposed laws, and/or contribute to rights protection (addressed in Chapter 3);
- (2) identifying the key participants involved in the parliamentary committee system and documenting their views on the variations in legitimacy afforded to the four committees studied (addressed in Chapter 4); and
- (3) assessing three tiers of impact – legislative, public and hidden – of parliamentary scrutiny on counter-terrorism laws, acknowledging both the direct and indirect influence committees can have on the multi-stage rights review that occurs at the federal level in Australia (addressed in Chapters 5, 6 and 7).

Having analysed the impact of the parliamentary committee system on the case study Acts, my research suggests that there is reason to take a slightly optimistic view of the Parliament's capacity to resist the will of the executive, even when dealing with policy issues attracting

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<sup>27</sup> Marsh, above n 8.

<sup>28</sup> Aldons, 'Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?' (2003) 18(1) *Australasian Parliamentary Review* 79, 92.



broad bipartisan support. Indeed, as discussed in Part III, it is this sometimes surprising capacity of the Parliament to push back against the will of the executive in the area of counter-terrorism laws that makes this case study so pertinent when seeking to evaluate the role the committee system plays in rights protection in Australia.

### *3 Addressing the Challenge of Attributing Executive or Parliamentary Action to Parliamentary Committees*

A number of scholars who have examined parliamentary committees in Australia and elsewhere have pointed to the difficulties associated with attributing particular executive or parliamentary action (including legislative amendments) to parliamentary scrutiny.<sup>29</sup> For example, Benton and Russell have warned that:

it is impossible to determine accurately whether a committee was causally responsible for recommendations being implemented or whether the government was influenced by the wider policy community. Often the same groups giving evidence to committees are lobbying government as well. In this sense counting recommendation success could overestimate committee influence. On the other hand, there are ways in which counting successful recommendations may underestimate the committee's importance. For example, if there is behind-the-scenes influence by the chair during telephone calls and meetings with ministers, or changes in policy as a result of ministers and officials preparing for committee hearings.<sup>30</sup>

Others have noted that executive acceptance of parliamentary committees' recommendations cannot always be taken at face value and may not in fact translate into legislative or policy change.<sup>31</sup>

The assessment framework employed in this thesis incorporates features that address these salient warnings. Most significantly, this thesis tests findings relating to the legislative impact of parliamentary committees against empirical evidence obtained through interviews with

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<sup>29</sup> See, eg, Hiebert, above n 14, 39; Janet L Hiebert, *Charter Conflicts: What Is Parliament's Role?* (McGill-Queen's University Press, 2002); Murray Hunt, 'The Impact of the Human Rights Act on the Legislature: A Diminution of Democracy or a New Voice for Parliament?' (2010) 6 *European Human Rights Law Review* 601; Feldman, above n 14.

<sup>30</sup> Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', above n 12, 766–7.

<sup>31</sup> Ibid; D Hawes, 'Parliamentary Select Committees: Some Case Studies in Contingent Influence' (1992) 20 *Policy & Politics* 227.

public servants, parliamentary staff, parliamentary counsel, committee members and Chairs, submission makers and parliamentarians. This is in line with the approach endorsed by Tolley,<sup>32</sup> Aldons,<sup>33</sup> and Benton and Russell,<sup>34</sup> who suggest that this kind of qualitative approach is crucial to making an objective and holistic assessment of a committee's impact. As former Committee Secretary to the SSCSB Stephen Argument has noted, these behind-the-scenes perspectives on the parliamentary scrutiny system can be critical both to determining how parliamentary committees work in practice and to evaluating their impact and effectiveness.<sup>35</sup> As noted above, this also aligns with Stephenson's approach to analysing models of rights protection,<sup>36</sup> as it prompts an investigation into both the direct and indirect contributions parliamentary committees make to rights review at the federal level in Australia.

In addition to drawing upon empirical evidence in publicly available sources to substantiate findings, the assessment framework also has regard to the following considerations identified by Benton and Russell:

- the style, reputation and culture of the committee, including the personality, effectiveness and partisan affiliation of the Chair (addressed in Chapter 4);<sup>37</sup>
- the nature of the policy area, and the broader policy community, being considered by the committee (addressed in Chapter 3);<sup>38</sup>

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<sup>32</sup> Tolley, above n 4, 48.

<sup>33</sup> Aldons, 'The Methodology', above n 15.

<sup>34</sup> Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', above n 12, 793.

<sup>35</sup> Stephen Argument, 'Of Parliament, Pigs and Lipstick (Slight Return): A Defence of the Work of Legislative Scrutiny Committees in Human Rights Protection' (Paper presented at the AIAL National Administrative Law Forum, Canberra, 21–22 July 2011). Similar observations have been made by Dr John Uhr, a former Senate officer and a former Secretary to both the Senate Regulations and Ordinances Committee and the SSCSB, who noted that the Senate's legislative scrutiny committees have an effect on the wider bureaucracy. John Uhr, 'The Role of Australian Legislatures in Protecting Rights' in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006) 41, 54.

<sup>36</sup> Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 8, 211.

<sup>37</sup> Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', above n 12, 781.

<sup>38</sup> *Ibid* 782.

- the media attention given to the findings and recommendations made by committees (addressed in Chapter 5).<sup>39</sup>

#### 4 *Addressing the Lack of a Clear Methodological Approach*

Some scholars have lamented the lack of a clear or consistently applied methodological approach to evaluating the effectiveness of parliamentary committees.<sup>40</sup> For example, Aldons said: ‘What I find lacking from my research on and familiarity with parliamentary committees in the past two decades is the general absence of sound methodology. The Australian academic evaluation cupboard is bare.’<sup>41</sup>

In this context, my research provides a unique opportunity to articulate a methodical, transparent template for evaluating parliamentary committees that responds to the challenges posed by past scholars and is capable of being adapted to apply in comparable jurisdictions. The assessment framework set out below adopts a transparent method of evidence collection and evaluation across three different tiers of impact (discussed below), and incorporates the common features of successful past evaluation models. These common features are:

- (1) clearly articulates the functions of parliamentary committees within their respective institutional context (addressed in Chapter 3);<sup>42</sup>
- (2) considers the power or status of the individual committee, within the broader political context (addressed in Chapters 3 and 4);<sup>43</sup>

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<sup>39</sup> Ibid 783.

<sup>40</sup> See, eg, Aldons, ‘Light at the End of the Tunnel?’, above n 28. See also Ian Holland, ‘Senate Committees and the Legislative Process’ (Parliamentary Studies Paper No 7, Crawford School of Economics and Government, Australian National University, 2009) <[http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07\\_Holland.ashx](http://www.aph.gov.au/~media/05%20About%20Parliament/52%20Sen/524%20Research%20and%20education/Other%20Publications/PSP07_Holland.ashx)>.

<sup>41</sup> Aldons, ‘Light at the End of the Tunnel?’, above n 28, 80.

<sup>42</sup> This was considered important by Aldons, ‘Light at the End of the Tunnel?’, above n 28, 80; see also Halligan, above n 4, 136; Aldons, ‘The Methodology’, above n 15, 23; Evans and Evans, ‘Legislative Scrutiny Committees and Parliamentary Conceptions of Human Rights’, above n 4; Evans and Evans, ‘Evaluating the Human Rights Performance of Legislatures’, above n 6; Williams and Reynolds, above n 1.

<sup>43</sup> This is particularly important for Malcolm Aldons, ‘Light at the End of the Tunnel?’, above n 28, 83; and Williams and Reynolds in their study of the PJCHR, Williams and Reynolds, above n 1, 484.

- (3) analyses a broad range of evidence, including direct testimony from those involved in the committee process, as well as evidence of legislative change that can be attributed to the work of committees<sup>44</sup> (addressed in Chapters 5, 6 and 7); and
- (4) differentiates between significant and non-significant committee impact (addressed in Chapters 5 and 6).<sup>45</sup>

The key features of the assessment framework employed in my research are outlined below.

### *C The Assessment Framework Adopted in this Thesis*

As noted above, in this thesis I adopt an assessment framework specifically designed to evaluate the impact of parliamentary committees on the development and content of federal laws. Like Stephenson, my research recognises the multi-stage rights review that occurs at the federal level in Australia, and the assessment framework actively looks for direct and indirect contributions to resolving disagreements on rights between and within institutions of government.<sup>46</sup> My assessment framework also shares features with the approach adopted by Evans and Evans in their 2006 research investigating the Australian Parliament's role in rights protection. Like the Evans and Evans model, my assessment framework is multi-staged and specifically designed to take account of the 'particular conceptual complexities of rights and the institutional peculiarities of legislatures'.<sup>47</sup> By building on the qualitative strategies

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<sup>44</sup> See, eg, Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', above n 12, 793. See also Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 6; Hiebert, *Charter*, above n 29, 562. A key component of the Evans and Evans methodology is a comprehensive compilation and analysis of the rights-oriented elements of each stage of the legislative process augmented by interviews with current and former participants in these processes and 'knowledgeable observers', such as journalists. See also Aldons, 'Light at the End of the Tunnel?', above n 28, 81–2; Halligan, above n 4, 140; Williams and Reynolds, above n 1, 493. These views were supported by the interview material obtained for this thesis. See, eg, Interviews with A and B (Canberra, 23 May 2016).

<sup>45</sup> See, eg, Aldons, 'The Methodology', above n 15; Monk, above n 14; Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees', above n 12; Paul Yowell, 'The Impact of the Joint Committee on Human Rights on Legislative Deliberation' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 141, 142; Williams and Reynolds, above n 1, 484–6.

<sup>46</sup> Stephenson, above n 37, 6–7.

<sup>47</sup> Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 6, 569.

employed by Evans and Evans and adopting an explicit three-tiered impact analysis,<sup>48</sup> my methodology identifies the strengths and weaknesses of the parliamentary model of rights protection and uncovers new opportunities for the model to be improved.<sup>49</sup> The contextualised features of my assessment framework (such as inquiries into a committee's legitimacy or political authority among key participants) also allows for considerations of what Campbell and Morris have described as the 'political approach' to human rights, where value is attributed to the political protection and promotion of human rights, as an alternative to, or in addition to, specific legislative or judicial protection of legally enforceable rights.<sup>50</sup> As discussed below, my methodology has also been developed with close regard to the international rights-mechanism evaluation model developed by the Dickson Poon School of Law.

#### D *The Dickson Poon School's Effectiveness Framework*

In 2013 the Dickson Poon School of Law, King's College London, commenced an 18-month project looking at the effectiveness of the UK's Joint Committee on Human Rights (the UK JCHR).<sup>51</sup> The project involved academics and high-level policy makers from nine countries as well as the United Nations, and aimed to evaluate the effectiveness of parliaments in overseeing

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<sup>48</sup> A tripartite conceptual framework with some similarities to my assessment framework has recently been developed and applied to the question of the relationship between democracy and human rights in Australia. See Carolien van Ham and Louise Chappell, 'Democracy and human rights: a tripartite conceptual framework' (2017) 23(2) *Australian Journal of Human Rights* 143. In this article, the authors examine the connection between democracy and human rights, outlining three democratic accountability mechanisms – *vertical*, *horizontal* and *diagonal* accountability – and the conditions under which those accountability mechanisms succeed and fail to promote human rights. Fletcher also adopts a methodology that goes beyond evaluating the legislative impact of the PJCHR alone and considers, for example, the impact of the PJCHR on the media and on Hansard debates: Adam Fletcher, 'Human Rights Scrutiny in the Australian Parliament' (Paper presented at 'Evaluating Inquests, Commissions and Inquiries' Symposium, La Trobe University, Melbourne, 1 November 2017).

<sup>49</sup> Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 6, 569.

<sup>50</sup> Tom Campbell and Stephen Morris, 'Human rights for democracies: a provisional assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7, 10; David Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected' in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999); David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58.

<sup>51</sup> Known as the Effective Parliamentary Oversight of Human Rights Project. See Webb and Roberts, above n 2, Executive Summary; see also 2.

human rights.<sup>52</sup> The key output from the project was the development of a framework for determining the effectiveness of parliamentary human rights oversight mechanisms (‘the Dickson Poon Framework’).<sup>53</sup>

The Dickson Poon Framework relies on the identification of a clear goal for the system of parliamentary oversight of human rights being assessed or developed, and recognises that this goal may have both ‘aspirational’ and ‘operative’ elements.<sup>54</sup> It also has regard to the system’s relevant stakeholders and constituencies, and their needs and interactions with the oversight mechanism.<sup>55</sup> The legitimacy of the oversight mechanism – that is, the level of political authority and respect it receives from its stakeholders and constituencies – is also critical to the Dickson Poon Framework.<sup>56</sup>

Importantly, the Dickson Poon Framework aims to take into account the institutional context of the Parliament within which the mechanism operates, recognising the law and policy-making power of the executive branch of government.<sup>57</sup> With this in mind, the Dickson Poon Framework sets out three tiers of ‘impacts’ that can be used to measure the oversight mechanism’s effectiveness. These three tiers are ‘legislative impacts’, ‘public impacts’ and ‘invisible impacts’. This tiered approach allows the Dickson Poon Framework to consider methodically the *pre-introduction* as well as the *post-introduction* impact of the mechanism.

These features of the Dickson Poon Framework are particularly useful in the context of evaluating parliamentary committees in Australia and directly address a range of the evaluation challenges identified above.<sup>58</sup> In addition, the Dickson Poon Framework has been developed and tested by a group of multi-disciplinary experts across a range of international

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<sup>52</sup> Ibid 2.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid Executive Summary.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid 3.

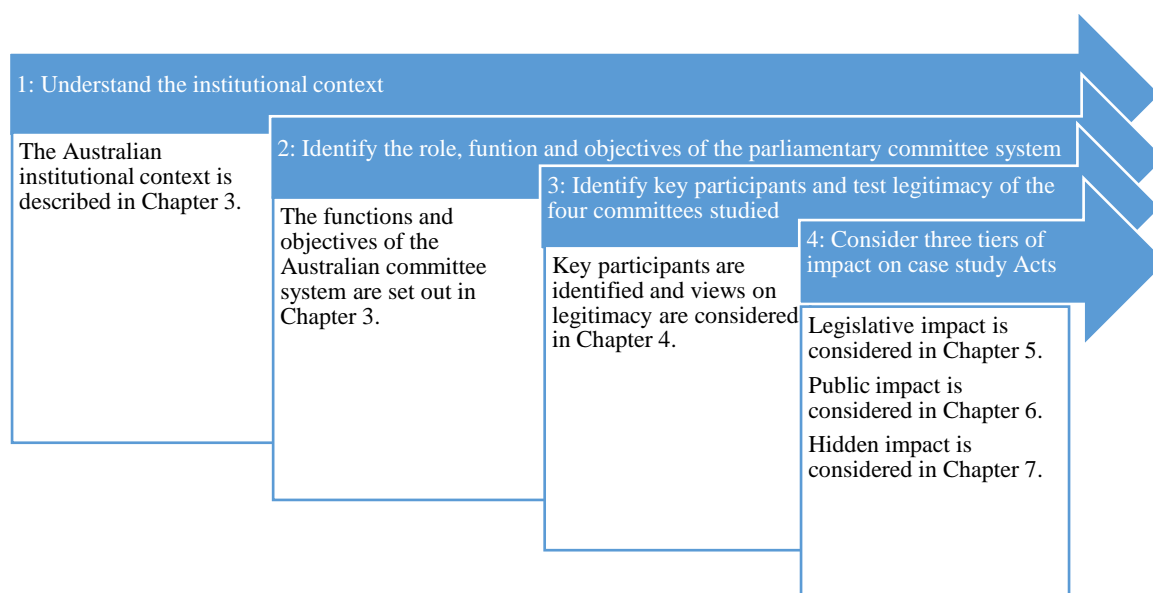
<sup>58</sup> For example, the Dickson Poon Framework recognises the importance of legislative impacts, but acknowledges that this should form only one part of a broader effectiveness analysis and demands consideration of the ‘real-life’ experiences of those working behind the scenes as part of this process. Ibid 3, 6–9.

jurisdictions,<sup>59</sup> and provides a template that facilitates the collection and analysis of a range of different sources of evidence, including interview material. As discussed below, the tiered approach to determining impact employed in the Dickson Poon Framework is reflected in the key steps in the assessment framework used in this thesis.

## E *Key Steps in the Assessment Framework*

The four key steps of the assessment framework employed in this thesis are summarised in Table 1.1.

**Figure 1 Steps in the Assessment Framework**



### 1 *Step 1: Set Out the Institutional Context in Which the Parliamentary Committee System Operates*

As discussed above, the first step in any successful evaluation of the effectiveness of parliamentary models of rights protection is to understand the institutional context in which

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<sup>59</sup> This group of experts also included Professor Andrew Byrnes, who has extensive experience working with parliamentary committees in Australia, including through his role as the inaugural legal advisor to the PJCHR.

such models operate. The Australian federal parliamentary landscape is set out in Chapter 3, along with the Australian experience of enacting counter-terrorism laws since 2001. Chapter 3 also briefly outlines the history of federal parliamentary committees, providing important contextual information about why and when particular committees were established and the role the committee system plays within Australia's federal parliamentary model of rights protection.

The counter-terrorism case study used in this thesis necessitates a focus on the following four parliamentary committees that are regularly involved in scrutinising or inquiring into Australia's counter-terrorism laws: the SSCSB, the Senate Standing Committees on Legal and Constitutional Affairs (the LCA Committees), the PJCIS and the PJCHR.

The history, functions and legal frameworks governing these committees are outlined in detail in Chapter 3. The contribution of other parliamentary committees to Australia's federal parliamentary model of rights protection is also noted in Chapter 3, but these other committees are not evaluated in detail.<sup>60</sup> As discussed in Part III, further research is needed to confirm whether the findings made in this thesis apply across the full range of Australian parliamentary committees tasked with reviewing or scrutinising proposed laws.

## 2 *Step 2: Identifying the Role, Functions and Objectives of the Australian Parliamentary Committee System and the Particular Committees Studied*

Step 2 of the assessment framework, also undertaken in Chapter 3, clearly articulates the role, function and objective of each of the committees studied, and explains how these individual committees feed into Australia's parliamentary model of rights protection. This is important as it demonstrates that not all of the four parliamentary committees are specifically designed to consider the rights compatibility of proposed laws. Some committees have other less rights-

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<sup>60</sup> For example, this thesis focuses primarily on joint and Senate parliamentary committees, rather than House committees. This weighting towards Senate or joint committees is a consequence of the broader institutional and political dynamic operating at the federal level that regularly works to bypass robust scrutiny by committees in the House (wherein the government of the day often completely controls the references, time frames and membership of committees) in favour of references to Senate or joint committees (wherein the government has less control). I also note that, as the case studies employed in this thesis concern *legislation*, I will not directly evaluate the impact of the Senate Standing Committee on Regulations and Ordinances (SSCRO); however, the key features of the SSCRO are considered in Chapter 3, Section B. For further discussion, see Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2012) 93.



explicit functions and objectives, such as improving the operational effectiveness of the proposed law (in the case of the PJCIS) or providing a deliberative forum for the public to express their views on a proposed law (in the case of the LCA Committees). As discussed in Part III, these other roles can offer important opportunities for individual committees to contribute to Australia's parliamentary model of rights protection, particularly when they are undertaken in conjunction with the work of rights-specific scrutiny committees such as the PJCHR and the SSCSB.

### 3 *Step 3: Identifying Key Participants and Determining Legitimacy*

The next step in the assessment framework identifies the *key participants* in the parliamentary committee system and looks for evidence of whether particular committees are seen as *legitimate*<sup>61</sup> by some or all of these participants. The key participants in the parliamentary committee system include:

- parliamentarians;
- elected members of the executive government;
- submission makers and witnesses to parliamentary committee inquiries;
- public servants and government officers;
- government agencies, including law enforcement and intelligence agencies;
- independent oversight bodies; and
- the media.

As Chapter 4 explains, rates of participation and diversity of participants differ across the committees studied, as does the level of legitimacy attributed to each body. This provides important insights into how each committee contributes to the parliamentary model of rights protection.<sup>62</sup>

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<sup>61</sup> The concept of 'legitimacy' is outlined further below and in Chapter 4.

<sup>62</sup> See, eg, Uhr, *Deliberative Democracy in Australia*, above n 10, 2; John Uhr, 'Parliamentary Measures: Evaluating Parliament's Policy Role' in Ian Marsh (ed), *Governing in the 1990s: An agenda for the decade*

(a) *The Idea of Legitimacy*

According to the *Macquarie Dictionary* definition, something is seen as 'legitimate' when it is in 'accordance with established rules, standards or principles' or 'genuine' or 'proper'.<sup>63</sup> However, the term 'legitimacy' has different meanings and attributes depending on the context in which it is used.<sup>64</sup> In this thesis, as in the Dickson Poon Framework, 'legitimacy' refers to 'political legitimacy', which generally denotes a quality of political institutions, political actors and the laws and policies that they make.<sup>65</sup> A wealth of literature exists on the topic of political legitimacy and the meaning attributed to this term has been contested and developed over time.<sup>66</sup> Some scholars, such as Weber, interpret political legitimacy *descriptively*, using it to describe how people feel about political authority and/or their political obligations (such as whether they accept the authority of a particular political institution, and the need to obey its commands).<sup>67</sup> Others, such as Rawls and Ripstein, see political legitimacy as a *normative* concept: a way to measure whether the exercise of political power or authority is accepted or seen as justified by the community it serves.<sup>68</sup> Political legitimacy has also been discussed in

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(CEDA/Longman, 1993) 347; Dominique Dalla-Pozza, 'Promoting Deliberative Debate? The Submissions and Oral Evidence Provided to Australian Parliamentary Committees in the Creation of Counter-terrorism Laws' (2008) 23(1) *Australasian Parliamentary Review* 39.

<sup>63</sup> C Yallop, J R L Bernard, D Blair, S Butler, A Delbridge, P Peters and N Witton (eds), *Macquarie Dictionary* (Macquarie Library, 4<sup>th</sup> edn, 2012) 817.

<sup>64</sup> For an overview of these different meanings see Fabienne Peter, 'Political Legitimacy' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (online, last updated 24 April 2017) <<https://plato.stanford.edu/entries/legitimacy/>>.

<sup>65</sup> Ibid.

<sup>66</sup> See, eg, David Beetham, *The Legitimation of Power* (Palgrave, 2002); Allan Buchanan, 'Political Legitimacy and Democracy' (2002) 112(4) *Ethics* 689; Immanuel Kant, *Practical Philosophy* (Mary J Gregor ed, Cambridge University Press, 1999); Jack Knight and James Johnson, 'Aggregation and Deliberation: On the Possibility of Democratic Legitimacy' (1994) 22 *Political Theory* 277; Bernard Manin, 'On Legitimacy and Political Deliberation' (1987) 15 *Political Theory* 338; Thomas Nagel, 'Moral Conflict and Political Legitimacy' (1987) 16(3) *Philosophy and Public Affairs* 215; Patrick Riley, *Will and Political Legitimacy* (Harvard University Press, 1982); Piers Norris Turner, '"Harm" and Mill's Harm Principle' (2014) 124(2) *Ethics* 299; Francis Fukuyama, 'Why Is Democracy Performing So Poorly?' (2015) 26(1) *Journal of Democracy* 11.

<sup>67</sup> Max Weber, 'Politics as a Vocation' in H H Gerth and C Wright Mills (eds), *Max Weber: Essays in Sociology* (Routledge, 1991); Talcott Parsons (ed), *Max Weber: The Theory of Social and Economic Organization* (Free Press, 1964).

<sup>68</sup> See, eg, John Rawls, *A Theory of Justice* (Harvard University Press, 1993); John Rawls, *Political Liberalism* (Columbia University Press, 1993); John Rawls, 'Reply to Habermas' (1995) 92(3) *Journal of Philosophy* 132; John Rawls, *The Law of Peoples* (Harvard University Press, 1999); Johan Rawls, *Lectures on the History of*

the context of representative democracy and deliberative democracy theories, connecting the *process* of political decision making with the notion of legitimacy, as well as (or sometimes instead of) the substance of the political decision itself.<sup>69</sup> It is beyond the scope of this thesis to explore these different articulations of ‘political legitimacy’; however, the use of the term in this thesis is infused with both descriptive and normative aspects and, as discussed further in Chapter 4, has a clear connection to deliberative democracy theory, particularly in so far as it intersects with the above discussion relating to rates of participation.

For many years, the scholarly debate on political legitimacy has typically focused on developing nations or supranational structures such as the European Union or the United Nations (UN).<sup>70</sup> The political legitimacy of modern Western liberal democracies such as Australia – with its stable, democratic features, enduring *Constitution* and relatively high levels of public accountability – has generally been taken for granted. Within the political discourse in Australia, the legitimacy of any given executive government at the federal level may be subject to more public debate, such as where a major political party fails to secure a strong majority in the House or an individual parliamentarian is elected on a particularly tight margin.<sup>71</sup> But even

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*Political Philosophy* (Harvard University Press, 2007); Arthur Ripstein, ‘Authority and Coercion’ (2004) 31(1) *Philosophy and Public Affairs* 2.

<sup>69</sup> See, eg, Bernard Manin, ‘On Legitimacy and Political Deliberation’ (1987) 15 *Political Theory* 338; Jean-Jacques Rousseau, *On the Social Contract* (Hackett, 1988); Philip Pettit, ‘Deliberative Democracy and the Discursive Dilemma’ (2001) 11 *Philosophical Issues* 268; James Boham, *Public Deliberation* (MIT Press, 1996); James Boham, ‘Deliberative Democracy and Effective Social Freedom: Capabilities, Resources, and Opportunities’ in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT, 1997) 321; Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 4-7, 196-200.

<sup>70</sup> See, eg, Fukuyama, above n 68; Isabelle Ley, ‘Opposition in International Law – Alternativity and Revisibility as Elements of a Legitimacy Concept for Public International Law’ (2015) 28 *Leiden Journal of International Law* 717; David Beetham and Christopher Lord, *Legitimacy and the EU* (Longman, 1998); Cristian Nițoiu, *The EU foreign policy analysis: democratic legitimacy, media, and climate change* (Palgrave Macmillan, 2015); Steven Slaughter, ‘The Prospects of Deliberative Global Governance in the G20: Legitimacy, Accountability, and Public Contestation’ (2013) 39(1) *Review of International Studies* 71; Shaun Nairne, ‘State Sovereignty, Political Legitimacy and Regional Institutionalism in the Asia-Pacific’ (2014) 17(3) *Pacific Review* 423.

<sup>71</sup> See Brenton Prosser and Richard Dennis, ‘Minority Government and Marginal Members: New issues for Political and Policy Legitimacy in Australia’ (2015) 36(4) *Policy Studies* 434; Brenton Prosser and Richard Dennis, ‘Policy in the Margins: New Issues for Parliamentary Legitimacy and Accountability’ (Paper presented at the Policy and Politics Conference 2014, Bristol, United Kingdom, September 2014) 1–14.

in this context, the political authority of the Australian Government in the descriptive or normative sense is rarely seriously questioned.

Having said this, in recent years, some scholars and commentators have begun to question whether we are moving into an era in which citizens no longer trust their national governments, and are disillusioned with their state's political institutions, even in stable Western democracies such as Australia.<sup>72</sup> Political phenomena such as 'Brexit',<sup>73</sup> the election of Donald Trump as the President of the United States,<sup>74</sup> the re-emergence of far right parties such as One Nation<sup>75</sup> and growing socio-economic inequality within nation-states<sup>76</sup> have all been cited as examples of voter dissatisfaction with conventional politics and parliamentary processes, and may be seen as indicators of a loss of political legitimacy by national governments or parliaments.

This thesis does not seek to elucidate these issues or evaluate the overall legitimacy attributed to the Australian Government, focusing instead on the particular question of the legitimacy of the parliamentary committee system as seen by its key participants. The findings made with respect to legitimacy are also limited by the characteristics of the key participants considered in this study, many of whom could be described as parliamentary 'insiders', and may not be

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<sup>72</sup> See, eg, Paul Patton, 'Rawls and the Legitimacy of Australian Government' (2009) 13(2) *Australian Indigenous Law Review* 59; 'Does Australia Need Electoral Reform?' (2001) 7 *About the House* 13; Ian McAllister, 'Corruption and Confidence in Australian Political Institutions' (2014) 49(2) *Australian Journal of Political Science* 174; Simon Tormey, 'The Contemporary Crisis of Representative Democracy' (2014) 1(2) *Democratic Theory* 104.

<sup>73</sup> Erik Jones, 'Brexit's Lessons for Democracy' (2016) 58(3) *Survival* 41; Stephen Barber, 'The Brexit Environment demands that Deliberative Democracy Meets Inclusive Growth' (2017) 32(3) *Local Economy: The Journal of the Local Economy Policy Unit* 219; Michael Moran, *The End of British Politics* (SpringerLink, 2017); Michael Wohlgemuth, 'Political Union and the Legitimacy Challenge' (2017) 16(1) *European View* 57; Pavlos Eleftheriadis, 'Constitutional Illegitimacy over Brexit' (2017) 88(2) *Political Quarterly* 182.

<sup>74</sup> See, eg, Matthew Parris, 'Can We Trust the People? I'm No Longer Sure (Democracy and the Election of Donald Trump)' (2016) 332 *Spectator* 21; Douglas Kellner, *American Nightmare: Donald Trump, Media Spectacle, and Authoritarian Populism* (SpringerLink, 2016); Nathan Gardels, 'Renovating Democracy and Salvaging Globalization' (2017) 34(1) *New Perspectives Quarterly* 2; Nathaniel Persily, 'Can Democracy Survive the Internet?' (2017) 28(2) *Journal of Democracy* 63.

<sup>75</sup> See, eg, Aurélien Mondon, *The mainstreaming of the extreme right in France and Australia: a populist hegemony?* (Ashgate, 2013); Peter Murphy, 'Populism Rising: The New Voice of the "Mad as Hell" Voter' (2016) 60(5) *Quadrant* 8.

<sup>76</sup> See, eg, Jeff Borland, 'Labour Market Inequality in Australia' (2016) 92(299) *Economic Record* 517; Julie Novak, 'Dissecting the Platypus Model' (2011) 27(1) *Policy: A Journal of Public Policy and Ideas* 25; David Hetherington, 'Drowning in the Rising Tide: Policy and Inequality in Australia' (2017) 88(3) *Australian Quarterly* 11.

representative of the broader community.<sup>77</sup> Despite this, there is no doubt that the findings reported in Chapter 4 have relevance to the broader question of the political legitimacy of the Australian Parliament. This is because the views of those working within the parliamentary system tell us something important about which features of the system attract the most respect, and generate the most political authority. The attributes of the parliamentary committee system that give rise to high levels of legitimacy in the eyes of a range of participants may, for example, point to opportunities for building resilience within the broader parliamentary system in the face of emerging global and local political challenges. Similarly, those attributes of the committee system that are seen as less legitimate by key participants may uncover particular vulnerabilities within the broader Australian Parliament. The broader implications of these findings are discussed further in Part III, where further research is recommended to help determine their relevance beyond the case study considered in my research.

One of the additional benefits of explicitly considering rates of participation and views on legitimacy is to guard against some of the methodological challenges identified above, particularly those relating to the structural power dynamic occurring between the Parliament and the executive and within the executive itself. The level of legitimacy attributed to a particular committee can both indicate and reflect a shift in this structural power dynamic that will be relevant to evaluating the impact of the committee, and its capacity to play a rights-enhancing role. For example, the evidence presented in Part II suggests that, when submission makers consistently prioritise one parliamentary committee over another (extending it greater legitimacy), the preferred committee has a much stronger legislative impact, and important rights-enhancing changes can be made to the laws it scrutinises or reviews.

#### 4 *Step 4: Measuring the Impact of Formal Parliamentary Scrutiny*

Step 4 is the most intensive and detailed step in the assessment framework. It aims to determine what impact a particular committee, and the committee system more broadly, is having on the proposed law. This step, which is addressed in Chapters 5, 6 and 7, examines the three levels of impact across the twelve Bills in the counter-terrorism case study.

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<sup>77</sup> For further information see Appendices A and B.

### *(a) Legislative Impact*

Legislative impact focuses on whether a committee, or the committee system, has done something that has directly changed the content of a law. There are many reasons why legislative impact is an attractive basis for evaluating the effectiveness of parliamentary committees. Chief among these is the fact that legislative impact can be expressed in quantitative terms. For example, it is possible to look at the recommendations made by a parliamentary committee and compare these to any amendments made to a Bill prior to enactment and reach a conclusion on whether the committee has had an impact. However, as discussed above, if legislative change is the sole impact measured, the evaluation may be blind to other, potentially more significant, impacts of the parliamentary committee system, and can in turn miss identifying precisely how the system contributes to Australia's parliamentary model of rights protection. For these reasons, the assessment framework adopted in this thesis also considers public impact and impacts largely hidden from public view.

### *(b) Public Impact*

As Halligan observes, 'the extent to which parliamentary committees contribute to discourse and deliberation on public policies is a highly important aspect of their work, by which they should be judged'.<sup>78</sup> In this thesis, this is described as 'public impact'. In other words, my research looks for evidence that the work of the parliamentary committee has influenced or been considered in public or parliamentary debate on a case study Bill, or in subsequent commentary or review of a case study Act. For example, evidence of public impact could include:

- unsuccessful amendments introduced to address parliamentary committee recommendations;
- changes to an Explanatory Memorandum accompanying the Bill as a result of a committee recommendation; and

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<sup>78</sup> Halligan, above n 4, 150.

- reference to the findings or recommendations of a committee in parliamentary and public debates on the Bill, reports or transcripts of other parliamentary committees, or reports of other relevant oversight bodies or non-parliamentary review mechanisms.

‘Public impact’ also considers the capacity of the parliamentary committees to gather and disperse information, or bring new voices into the public debate.<sup>79</sup> As discussed in Chapter 6, there is a strong relationship between evidence of ‘public impact’ and parliamentary committees’ role in providing a deliberative forum for the consideration of a wide range of views on a proposed law.<sup>80</sup> When considered in concert with Step 2 (relating to legitimacy), evidence of ‘public impact’ can also be used to demonstrate what Aldons has described as the ‘power’ or ‘influence’ of the committee in its institutional context.<sup>81</sup>

### *(c) Hidden Impact*

The most unique and arguably most valuable aspect of the assessment framework employed in this thesis is the use of empirical evidence gained from targeted interviews with participants to uncover the ‘hidden impact’ of parliamentary committees on the content and development of the case study Acts. This part of the framework asks whether those at the coalface of developing and drafting counter-terrorism laws turn their mind to the work of parliamentary committees when undertaking their tasks, and considers whether this has a rights-enhancing impact.

The ‘hidden impact’ of the parliamentary committee system, and particular components of that system, is considered in detail in Chapter 7. Evidence of ‘hidden impact’ includes evidence of:

- improved or growing ‘rights literacy’ among those directly involved in the legislative and policy development process;

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<sup>79</sup> See, eg, Malcolm Shaw, ‘Parliamentary Committees: A Global Perspective’ (1998) 4(1) *Journal of Legislative Studies* 225; Griffith, above n 4.

<sup>80</sup> This is discussed further in Chapter 6 where the work of Dalla-Pozza and Uhr is considered. See, eg, Uhr, *Deliberative Democracy in Australia*, above n 4, 25; Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?’ (2016) 27(4) *Public Law Review* 271, 274.

<sup>81</sup> Aldons, ‘Light at the End of the Tunnel?’, above n 28, 80.

- scrutiny principles or criteria, or past committee findings, being taken into account or anticipated in the legislative and policy development process; and/or
- scrutiny principles or criteria, or past committee findings, being incorporated into public servant training manuals or guidelines.

As discussed above, collecting evidence of the hidden impact of parliamentary committees can be challenging due to the need to look beyond documentary sources and consider more subjective material including interviews but, as Evans and Evans and Benton and Russell have shown in their empirical-based work,<sup>82</sup> it is not impossible. Much publicly available material exists that points to the hidden impacts of scrutiny, including training manuals, published guidelines, information in annual reports, and submissions and oral evidence given at parliamentary and other public inquiries and hearings. This material can then be tested against a range of targeted individual interviews I conducted with key participants in this process.

## 5 *Conduct of Interviews*

As outlined in detail in Appendices A and B, I conducted a total of 40 interviews as part of this research. These interviews were conducted with public servants (including departmental officers and agency officials), parliamentary counsel, parliamentary committee secretariat staff, other parliamentary staff, current and former parliamentarians, submission makers, and independent oversight bodies. The information derived from these interviews has proven critical to testing the veracity of all forms of impact measured in this thesis, as well as testing the findings and recommendations made in Part III. Formal ethics approval was obtained to conduct the interviews, as detailed in Appendix A.

The interviews are not designed to provide a statistically significant or fully representative sample of the views of the key participants in the parliamentary committee system. The selection of interviewees was no doubt influenced by subjective factors including location, availability and familiarity. Having said this, efforts were made to ensure that the views of a broad spectrum of participants were considered, and that a balance was struck in terms of

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<sup>82</sup> Benton and Russell, 'Assessing the Impact of Parliamentary Oversight Committees' above n 12; Evans and Evans, 'Evaluating the Human Rights Performance of Legislatures', above n 6.



experience, expertise and political allegiance. A full list of interviewees is provided in Appendix B.

Each interview was designed to be approximately one hour in duration and semi-structured in form, covering the following general topics:

- the participant's involvement in either (a) the development or review of the case study Acts or (b) parliamentary committees;
- any specific parliamentary committee experiences the participant has been involved in, with a focus on the development, scrutiny or review of the case study Acts;
- the participant's views on the (a) legislative impact, (b) other visible impacts and (c) hidden impacts of parliamentary committees on proposed laws; and
- the participant's perspective on which particular features of the committee system work well and why.

The interviews were not designed to illicit any confidential or security-sensitive information, but rather to gain an insight into how the parliamentary committee system works in practice. All interviewees were provided with the opportunity to participate on an anonymous or semi-anonymous basis, and to review the material published in this thesis. I am sincerely grateful to all interviewees for participating in my research.

## *6 Risk Mitigation Components of the Assessment Framework*

As noted above, my assessment framework has been carefully developed to address the challenges associated with evaluating parliamentary committees discussed earlier in this chapter. However, a number of additional strategies are employed to strengthen the findings made in this thesis, and to demonstrate their broader applicability beyond the particular committees studied and the case study Acts. These strategies include applying a high threshold to attributing legislative change to the work of parliamentary committees, for example by requiring evidence of either direct attribution to the work of the committee in the revised Explanatory Memorandum accompanying any successful legislative amendments, or a direct quotation from a relevant first-hand participant, such as the responsible Minister. As noted above, the assessment framework also tests information gained as a result of interviews against

publicly available written materials to help identify any subjective factors that may influence the views or perspectives offered by particular participants in the committee system.

Finally, this thesis actively addresses the potential limitations of the counter-terrorism case study. As noted in Chapter 1, while the counter-terrorism case study has some exceptional socio-political features, it also contains Bills of diverse character and content and allows for a variety of scrutiny experiences to be examined over a 15-year period and across different governments and parliaments. This helps guard against any risk that the findings made in this thesis will have limited broader application. Part III also sets out a range of recommendations designed to facilitate further research to confirm the broader applicability of the findings made in this thesis.

Taken together, the methodology employed in this thesis is deliberately designed to respond to the challenges identified by other scholars with experience in evaluating parliamentary committees. This in turn allows for robust findings to be made regarding the impact of the parliamentary committees on the development and content of proposed laws, and the contribution the system makes to Australia's parliamentary model of rights protection. While I acknowledge that further research is necessary to confirm that my findings have applicability beyond the case study example, I am confident that the methodology I employ provides a useful template for others wishing to understand or evaluate the performance of parliamentary committees in Australia and in other comparable jurisdictions.

## CHAPTER 3: THE AUSTRALIAN LANDSCAPE AND THE MAKING OF COUNTER-TERRORISM LAWS

As outlined in Chapter 2, understanding the institutional context of Australia's parliamentary committee system is critical when evaluating the impact of this system on the case study Acts and identifying options to improve its rights-enhancing capacity. This chapter introduces the Australian parliamentary committee system, with a particular focus on the four committees studied and how they fit within the broader parliamentary landscape. It also sketches some of the domestic and international circumstances in which Australia's modern counter-terrorism framework was developed and introduced. This chapter lays the foundation for a more detailed exploration of how parliamentary committees interact with the different law-making institutions at the federal level and the role they played in directly and indirectly identifying and addressing rights issues within the case study Acts.<sup>1</sup>

### A *The Parliamentary Committee System and the Australian Parliament*

#### 1 *Parliamentary Committees and the Features of the Australian Parliament*

The *Australian Constitution* diffuses power in two different ways: through its bicameral, federal structure and through the doctrine of the separation of powers.<sup>2</sup> Both of these features inform the structure and function of the modern parliamentary committee system, and provide an important source of its legitimacy. For example, the bicameral, federal nature of Australia's constitutional structure gives rise to two differently constituted Houses of Parliament, which in

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<sup>1</sup> For a comprehensive discussion of the direct and indirect forms of institutional engagement on rights issues see Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016).

<sup>2</sup> A number of High Court cases have discussed how the doctrine of the separation of powers operates under the *Australian Constitution*, including *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (*Boilermakers Case*), *Waterside Workers' Federation of Australia v J W Alexander* (1918) 25 CLR 434; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1. For commentary see Gerard Carney, 'Separation of Powers in the Westminster System' (1994) 8(2) *Legislative Studies* 59; George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 6<sup>th</sup> ed, 2014) 25–7; David Hume and George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 121; Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; Robert French, 'The Parliament, the Executive, the Courts and the People' (1996) 3 *Deakin Law Review* 1, 12; Hammond, 'The Judiciary and the Executive' (1991) 1 *Journal of Judicial Administration* 88. For further discussion see David Hume and George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 54.

turn work as an effective check on each other in the law-making process.<sup>3</sup> The parliamentary committee system provides the practical forum for both Houses to fulfil these roles, and is particularly critical to the Senate's role in providing a 'check' on the legislative activities of the House of Representatives, which is in practice dominated by members of the executive government.

The doctrine of *responsible government*<sup>4</sup> is also a defining feature of the *Constitution* and informs the character of the parliamentary committees considered in this thesis.<sup>5</sup> For example, by subjecting government legislative proposals to public scrutiny and by providing a forum for Ministers and their delegates to be questioned, the system provides a 'fairly direct line of accountability from the people who elect the members of parliament to the executive'.<sup>6</sup> The doctrine of responsible government also helps to explain why the parliamentary committee

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<sup>3</sup> See James Odgers, *Australian Senate Practice* (Commonwealth of Australia, 13<sup>th</sup> ed, 2012) ch 1, in particular 4–5. See also D Shell, 'The history of bicameralism' (2001) 7(1) *Journal of Legislative Studies* 13; S Bennett, 'The Australian Senate' (Research Paper No 6, Parliamentary Library, Parliament of Australia, 2004) 2. For judicial consideration of the bicameral features of the *Constitution* see, eg, *Western Australia v Commonwealth* (1975) 134 CLR 201 (Barkwick CJ); *Egan v Willis* (1998) 195 CLR 424; *McGinty v Western Australia* (1996) 186 CLR 140; *Victoria v Commonwealth* (1975) 134 CLR 81.

<sup>4</sup> Generally speaking, 'responsible government' means that the constitutionally enshrined Head of State (in Australia's case the Queen represented by the Governor-General) acts on the advice of his or her Ministers who are directly responsible for their actions to the Parliament, and the people. *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413. See also Hume and Williams, above n 2, 127. For a historical perspective see Samuel Griffith, 'Notes on Australian Federation: Its Nature and Probable Effects' [1896] *Australian Colonial Law Monographs* 2, 17, quoted in John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Lexis Nexus, Revised ed, 2014) 704.

<sup>5</sup> For judicial consideration of the doctrine of 'responsible government' in Australia see, eg, *Egan v Willis* (1996) 40 NSWLR 650, 660 (Gleeson CJ), 447–5 (Gaudron, Gummow and Hayne JJ) and 501 (Kirby J); *Egan v Chadwick* (1999) 46 NSWLR 563. See also Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell, 1967) 54; Hume and Williams, above n 2, 127; Brian Galligan, *Senate Committees – can they halt the decline of Parliament*, Parl Paper No 12 (1990); Bill Hayden, 'Senate Committee and Responsible Government' (Speech delivered at the Conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees, Canberra, 3 October 1990). For further background on the origins of the doctrine see Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 262–7; for commentary on the doctrine's operation in Australia see, eg, M Spry, 'Ministerial Responsibility: Its Changing Content' (Research Note No 8, Parliamentary Library, Parliament of Australia, 1995).

<sup>6</sup> Brian Galligan, *Parliamentary Responsible Government and the Protection of Rights*, Parl Paper No 18 (1992). See also Samuel Griffith, 'Notes on Australian Federation: Its Nature and Probable Effects' [1896] *Australian Colonial Law Monographs* 2, 17, quoted in Quick and Garran, above n 4, 704; R G Menzies, *Central Power in the Australian Commonwealth* (Cassell, 1967) 54. The doctrine of responsible government is also reflected in parliamentary practices such as question time, and the requirement that the executive government provide information to parliamentary committees: see Hume and Williams, above n 2, 217.

system is seen by some as an attractive form of rights protection, when compared with other models that incorporate specific roles for the judiciary in the determination of rights disputes.<sup>7</sup>

The principle of *parliamentary sovereignty*<sup>8</sup> is also at the heart of Australia's exclusively parliamentary model of rights protection, and provides an important legitimising basis for the parliamentary committee system. This principle was the primary practical and normative focus of the framers of the *Constitution*, and it remains at the centre of modern democratic discourse in Australia.<sup>9</sup> As Goldsworthy explains, the doctrine of parliamentary sovereignty invests a single law-making body elected by the people with the power to respond to emerging issues and needs, and to modify outdated laws.<sup>10</sup> A sovereign parliament also forms part of what Hart has described as a 'rule of recognition',<sup>11</sup> providing the criteria for determining the validity of other laws, and seen as binding by the most senior participants in the system.<sup>12</sup>

The final feature of the Australian Parliament that is particularly relevant to the committee system is the role and dominance of *political parties*.<sup>13</sup> Australia's strong party-political culture

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<sup>7</sup> See, eg, Jeffrey Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 69; Adrienne Stone 'The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act' in Tom Campbell, Keith Ewing and Adam Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) 391. See also Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 67–9.

<sup>8</sup> In his seminal 1885 work, Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1889), Dicey explained that the principle of parliamentary sovereignty means that Parliament has the constitutional 'right to make or unmake any law whatever', and, further, that no person or body has the legal right to override or set aside the legislation of Parliament, at 39–40. For a modern interpretation of this principle by the English Courts see *R (Jackson) v Attorney General* [2006] 1 AC 262, 302 (Lord Steyn). See also Hume and Williams, above n 2, 68.

<sup>9</sup> Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999) 1. For judicial consideration of the application of the principle of parliamentary sovereignty in Australia see, eg, *McGinty v Western Australia* (1996) 186 CLR 140, [22], [38], [42], [58], [65]–[69]; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

<sup>10</sup> Goldsworthy, above n 9, 1; see also Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 17.

<sup>11</sup> H L A Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed, 1994) 92; Goldsworthy, above n 9, 1, 239.

<sup>12</sup> Goldsworthy, above n 9, 1, 239. See also Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, above n 10, 17.

<sup>13</sup> Although political parties are not mentioned in the text of the *Constitution*, it is clear that the framers were alive to the dominant political philosophies of the time. Goldsworthy, above n 9, 185. See also G S Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988: Ten Perspectives* (Melbourne University Press, 1989); John Hirst, 'A Chance to End the Mindless Allegiance of party Discipline', *The Sydney Morning Herald* (Sydney), 25 August 2010; Bruce Stone, 'Size and Executive-Legislative Relations in Australian Parliaments' (1998) 33 *Australian Journal of Political Science* 37, 38.

informs the functions and objectives of the committee system and helps to define the limits of what it can realistically achieve. Party politics can mean that the law-making functions of the House are regularly synonymous with the will of the executive. In that case the Senate – and in particular the Senate committee system – becomes the only real forum for debating laws and contesting policy.<sup>14</sup> Alternatively, the electorate can elect candidates who are not aligned with the major political parties, leading to a ‘hung Parliament’ (where neither major party holds a clear majority in the House), or a scenario where a minor party or a group of independents holds the balance of power in the Senate. The influence of party politics may also be evident within parliamentary committees, particularly in the case of joint committees dominated by members of the House, or Senate committees that enjoy government majorities or that are chaired by powerful minority party or independent Senators.

Some take the view that, as the dominance of political parties rises, the potential for the carefully designed Australian parliamentary system to offer robust scrutiny of executive action decreases.<sup>15</sup> However, like all of the features of the Parliament discussed in this chapter, the rise and dominance of political parties is a dynamic rather than static phenomenon. As will be explored further in Part III, party politics is thus crucial to understanding how the Parliament and its subsidiary bodies work, but it too can be contested and subject to change.

## 2 *Parliamentary Committees and the Functions of the Parliament*

The key features of the Parliament discussed above help inform the Parliament’s primary functions, which are to represent the people of Australia, and to make laws for those people.<sup>16</sup> The Parliament also has features designed to delineate law-making power (such as the separation of powers that is evident in Chapter 3 of the *Constitution*) and to protect the rights of citizens from the unbridled will of the executive (such as the doctrine of parliamentary sovereignty and the bicameral structure of the Parliament). It is in this context that the

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<sup>14</sup> Marian Sawer, Norman Abjorensen and Philip Larkin, *Australia: The State of Democracy* (Federation Press, 2009) 153–4. See also Bruce Stone, *Australian Bicameralism: Potential and Performance in State Upper Houses*, Parl Paper No 40 (2005).

<sup>15</sup> See, eg, David Feldman, ‘Democracy, Law and Human Rights: Politics as Challenge and Opportunity’ in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 95, 98.

<sup>16</sup> See, eg, *Commonwealth v Tasmania* (‘Tasmanian Dam case’) (1983) 158 CLR 1, [6], [29]; *Lange* (1997) 189 CLR 520, 557; see also Parliament of Australia, *About Parliament*, Parliament of Australia (2016) <[http://www.aph.gov.au/About\\_Parliament](http://www.aph.gov.au/About_Parliament)>; Hume and Williams, above n 2, 127.

parliamentary committee system plays a crucial role.<sup>17</sup> For example, both Houses regularly rely on the committee system to fulfil their law-making function. This is because, as Griffith and Ryle note, both Houses spend most of their time responding to the policy initiatives or legislative proposals of the government of the day.<sup>18</sup> In this way, Parliament's law-making function can be described as a *scrutiny function*. It is a forum to debate the content, effect and policy merits of laws proposed by the executive government. The committee system allows the Parliament to 'outsource' this legislative scrutiny function at key points in the process, by referring a Bill to a particular Senate, House or joint committee for inquiry and report. As Marinac has observed, the committee system is the 'means by which the Senate can deal with its massive workload without sacrificing the detailed scrutiny which is the *raison d'être* of a house of review'.<sup>19</sup>

The Parliament also relies heavily on the committee system to give meaning to its constitutional commitment to representative democracy by providing a forum for members to hear directly from the people they represent.<sup>20</sup> The committee system offers all members the opportunity to contribute to the law-making process, regardless of their ministerial or shadow ministerial status. In this way, the committee system can also be described as a means of facilitating *deliberative democracy*,<sup>21</sup> which is based on the notion that democracies should provide for informed, reflective and cooperative decision making and policy development.<sup>22</sup> As Levy and Orr explain, ideally deliberative law making should be inclusive, and open-minded, where key participants speak and well as listen and reach 'beyond rudimentary, majoritarianism to

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<sup>17</sup> See, eg, Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Paper presented in the Department of the Senate Occasional Lecture Series, Canberra, 8 December 2006).

<sup>18</sup> J A G Griffith and Michael Ryle with M A J Wheeler-Booth, *Parliament: functions, practice and procedures* (Sweet and Maxwell, 1989) 5.

<sup>19</sup> Anthony Marinac, 'The Usual Suspects? Civil Society and Senate Committees' (Paper submitted for the Senate Baker Prize, 2003) 129. For example, in the year 2015, the Senate sat for a total of 60 days and passed 177 separate Acts. In 2010, the Senate sat for only 46 days and passed 150 Acts.

<sup>20</sup> In House and joint committees, the government of the day generally holds the position of Chair and enjoys the support of the majority of members. For further discussion see Elaine Thompson, 'The Senate and Representative Democracy' (Senate Brief No 10, Parliamentary Library, Parliament of Australia, 1998).

<sup>21</sup> John Uhr, *Deliberative democracy in Australia: the changing place of parliament* (Cambridge University Press, 1998) 10–11. See also Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

<sup>22</sup> Ron Levy, 'The Law of Deliberative Democracy: Seeding the Field' (2013) 12(4) *Election Law Journal* 355, 355; Levy and Orr, above n 21, 22–23. See also Sawer, Abjorensen and Larkin, above n 14, 4.

accommodate other democratic values'.<sup>23</sup> Dalla-Pozza suggests that there are two primary ways in which the parliamentary committee system helps the Parliament to achieve its deliberative function.<sup>24</sup> The first is through the practical capacity of committees to 'reach out' to the community by inviting written submissions and holding public hearings. This ensures that a wider range of interests are consulted<sup>25</sup> and also provides what Odgers has described as 'an opportunity for proponents of divergent views to find common ground'.<sup>26</sup> This also has similarities to what Marsh has called an 'understanding of policy issues amongst relevant participants, including legislators, public servants, ministers, interest groups, the media and the broader community'.<sup>27</sup> The second is through the act of scrutiny itself, which Uhr describes as 'at the heart of the work of a deliberative assembly'.<sup>28</sup>

The parliamentary committee system also allows the Parliament to fulfil its constitutional role of holding the executive government to account for its exercise of legislative power.<sup>29</sup> Senate committees play a particularly important role in holding the executive to account and have developed procedural features that guard against the type of executive dominance that often infects the House committee system.<sup>30</sup> Among these are the standing 'technical' scrutiny committees that inquire into every Bill and regulation (rather than waiting for a referral from one of the Houses of Parliament) and the powers of Senate committees to hold hearings into estimates of government expenditure.<sup>31</sup>

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<sup>23</sup> Levy and Orr, above n 21, 4.

<sup>24</sup> Dominique Dalla-Pozza, 'The Conscience of Democracy? The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws' (Paper presented at the Australasian Law and Society Conference, December 2006) 20–1.

<sup>25</sup> Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) 76.

<sup>26</sup> Odgers, above n 3, 366. See also Marinac, above n 19, 129.

<sup>27</sup> Ian Marsh, *Can Senate Committees Contribute to Social Learning*, Parl Paper No 45 (2006) 1.

<sup>28</sup> John Uhr, *Deliberative democracy in Australia: the changing place of parliament* (Cambridge University Press, 1998) 149–50.

<sup>29</sup> Gabrielle Appleby, Alexander Reilly and Laura Grenfell (eds), *Australian Public Law* (Oxford University Press, 2<sup>nd</sup> ed, 2014) 103–4. See also Hayden, above n 5.

<sup>30</sup> Reid and Forrest, above n 13, 190.

<sup>31</sup> Gabrielle Appleby, Alexander Reilly and Laura Grenfell (eds), *Australian Public Law* (Oxford University Press, 2<sup>nd</sup> ed, 2014) 106. While not the focus of this thesis, Senate Estimates hearings constitute one of the primary ways the Parliament can fulfil its function of holding the executive to account as they provide 'an opportunity for opposition Senators to question directly officers of the public service who are proposing the items of expenditure under consideration': at 106.



Finally, as discussed in Chapter 1, the parliamentary committee system also makes a central contribution to Parliament's rights-protecting function.<sup>32</sup> Committees are tasked with alerting the Parliament to executive actions that unduly interfere with individual rights or freedoms, or abrogate certain rule of law principles.<sup>33</sup> Committees also arm members of the public, including sophisticated submission makers, with the information they need to challenge or question the merits of proposed law or policy that may have particular rights implications for groups within the Australian community.<sup>34</sup> As discussed in Chapter 1, many scholars have questioned both the effectiveness of the committee system at performing this function, and the appropriateness of relying on this form of rights protection in Australia.<sup>35</sup> However, regardless of whether Australia's parliamentary model of rights protection is viewed as strong or weak, the committee system is an undisputed and central component of Australia's parliamentary model of rights protection. This makes evaluating the impact of parliamentary committees on rights-engaging laws particularly important.

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<sup>32</sup> Even before the introduction of the *Human Rights (Parliamentary Scrutiny) Act 2010*, the parliamentary committee system was regularly identified as the central pillar in the Australian parliamentary model of rights protection. See, eg, Commonwealth of Australia, *Common Core Document forming part of the Reports of State Parties – Australia – incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (June 2006) 5–6 <[http://dfat.gov.au/international-relations/themes/human-rights/Documents/core\\_doc.pdf](http://dfat.gov.au/international-relations/themes/human-rights/Documents/core_doc.pdf)>.

<sup>33</sup> As Galligan notes: 'Much of what the Senate actually does has more to do with protecting individual citizens' rights than states' rights or executive responsibilities. ... An institution such as the Senate can help make government responsible by defending and promoting individuals' interests in having duly processed government': Galligan, above n 6.

<sup>34</sup> For example, in its submission to the PJCIS challenging key features of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014, the Law Council of Australia referred to the PJCHR's previous analysis of the human rights compatibility of the control order regime (submission 16), and its submission to the PJCIS's 2010 inquiry into the potential reforms of National Security Legislation. The Gilbert and Tobin Centre for Public Law (submission 36) referred to a range of past committee inquiries, including the Senate Legal and Constitutional Affairs Committee's 2006 inquiry into amendments to the Telecommunications (Interception and Access) Act 1979 (Cth). Further examples are provided in Chapter 6.

<sup>35</sup> See Evans and Evans, 'Australian Parliaments and the Protection of Human Rights', above n 17, 543–69. See also James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *Australian Institute of Administrative Law Forum* 13; David Kinley and Christine Ernst, 'Exile on Main Street: Australia's Legislative Agenda for Human Rights' (2012) 1 *European Human Rights Law Review* 58; Rosalind Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23 *Public Law Review* 75; Hugh Mannreitz, 'Commonwealth Statements of Compatibility – Small Steps, Early Days' (2012) 71 *Human Rights Law Centre Bulletin* 8; Bryan Horrigan, 'Reforming Rights-Based Scrutiny and Interpretation of Legislation' (2012) 37 *Alternative Law Journal* 228; George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58, 81.

## B *The Emergence of the Australian Parliamentary Committee System*

From the above discussion, it may be tempting to think that committees have always been a part of the Australian Parliament; however, in reality it took many years to establish the sophisticated system of committees that operates today.<sup>36</sup> The first Standing Committee<sup>37</sup> to be established was the Senate Standing Committee on Regulations and Ordinances (SSCRO) in 1930.<sup>38</sup> It was tasked with scrutinising proposed regulations to ensure that they are:

- (a) in accordance with the statute;
- (b) do not unduly trespass on personal rights and liberties;
- (c) do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions; and
- (d) do not contain matter more appropriate for parliamentary enactment.<sup>39</sup>

As Grenfell documents, these scrutiny principles initially attracted criticism, including on the basis that they invited inquiries of a ‘political character that would be better dealt with by lawyers, judges or the Senate as a whole’.<sup>40</sup> However, over time the SSCRO has emerged as ‘a pioneering chapter in legislative scrutiny across the Westminster world’<sup>41</sup> and proven influential in the development of future committees, including those considered in my research.

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<sup>36</sup> Odgers, above n 3, ch 16.

<sup>37</sup> Select Committees of the Senate emerged as the first parliamentary committees on the Commonwealth scene, followed by the establishment of two joint committees (Public Accounts and Public Works) in 1913. Subsequently, a third category, Standing Committees, was introduced to provide for committees with more permanent membership and powers. See Reid and Forrest, above n 13, 368–70; Odgers, above n 3, ch 16.

<sup>38</sup> Laura Grenfell, ‘An Australian Spectrum of Political Rights Scrutiny: Continuing to Lead by Example?’ (2015) 26(1) *Public Law Review* 19, 21.

<sup>39</sup> See SSCRO, Parliament of Australia, *Report* (1930) 23. The original 1930 wording of the fourth principle provided: ‘that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment’. See Grenfell, above n 3838, 22.

<sup>40</sup> As Grenfell observes, the acceptance of these scrutiny principles was not automatic across the Parliament and attracted attention from the Leader of the Opposition in the Senate, Senator Pearce, who expressed the view that the Committee’s prescribed terms of reference were of a legal or political character that would be better dealt with by lawyers, judges or the Senate as a whole. Grenfell, above n 38, 22, quoting from Commonwealth, *Parliamentary Debates*, Senate (8 May 1930); Evidence to Senate Select Committee on Standing Committees, Parliament of Australia (Canberra, 4 February 1930); and Senate Standing Committee on Standing Committees, Parliament of Australia, *Report* (1930).

<sup>41</sup> John Uhr, ‘The Performance of Australian Legislatures in Protecting Rights’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and*

The next significant development in the history of the federal committee system occurred in the late 1950s when the well-respected Clerk of the Senate, James Odgers, travelled to the United States to study the American committee system.<sup>42</sup> Upon his return, he provided a report to the Senate<sup>43</sup> recommending the introduction of a system of Senate Standing Committees to ‘watch and appraise the administration of the laws and to inform public opinion in relation to certain defined fields of governmental operations’.<sup>44</sup> No action was taken for many years, until parliamentary committees made a cameo appearance in Gough Whitlam’s 1967 federal election campaign, with the Labor Party promising to establish a Senate committee system if elected to office.<sup>45</sup>

Following the election, Senator Lionel Murphy became Leader of the Opposition in the Senate and, with the support of Odgers and a band of backbenchers, began a robust campaign to establish a strong Senate committee system.<sup>46</sup> Proposals were put for both Estimates and General Purpose committees, and in a single night in 1970 (with the help of the Queensland Liberal dissident Ian Wood who crossed the floor) seven Legislative General Purpose Committees and five Estimates Committees were established in the Senate.<sup>47</sup> Each of these committees had six members, three chosen by the government and three nominated by the Leader of the Opposition in the Senate in consultation with any minority group or groups, or independent Senators or Senator.<sup>48</sup> This system was later reflected in the Standing Orders, and

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*Reform in Australia* (Ashgate, 2006) 41, 50. This was the first of the single House standing committees in Australia. See J Halligan, R Miller and J Power, *Parliament in the Twenty-First Century: Institutional Reform and Emerging Roles* (Melbourne University Press, 2007) 44.

<sup>42</sup> Outside of the establishment of the SSCRO, until World War II ‘both Houses of Parliament were relatively passive about the use of select, standing and joint committees’. It was the war-time political environment that prompted the most strident innovations in parliamentary oversight of executive action. See Reid and Forrest, above n 13, 373.

<sup>43</sup> Parliament of Australia, *Report on the United States*, Senate, Parliamentary Paper No 36 (1956).

<sup>44</sup> Parliament of Australia, *Report on the United States*, Senate, Parliamentary Paper No 36 (1956), quoted in Anne Millar, *The World of Senate Committees*, Parl Paper No 12 (1991) vi.

<sup>45</sup> Millar, above n 44, vii.

<sup>46</sup> Ibid. A report prepared by Odgers was tabled in March 1970, which led to a Senate debate in June 1970 wherein general agreement was reached with respect to the need for a comprehensive standing committee system.

<sup>47</sup> Following the resolution, the *Sydney Morning Herald* reported on 3 November 1970 that the introduction of the new, wide-ranging committee system would ‘make the red-carpeted Upper House potentially the most powerful parliamentary chamber in Australia’. Millar, above n 44, vi–vii.

<sup>48</sup> Reid and Forrest, above n 13, 375.

the Senate's Legislative and General Purpose Standing Committees became an entrenched part of the Australian parliamentary culture, particularly in the Senate.<sup>49</sup>

The next important landmark occurred in 1981, with the establishment of the SSCSB. The SSCSB's origins are intrinsically linked to the work of the SSCRO, which had become increasingly active in its scrutiny of delegated legislation. It became clear to some parliamentarians that legislative provisions were being enacted that 'would never have survived the scrutiny of the [SSCRO]'<sup>50</sup> and that a specific committee tasked with scrutinising Bills against a similar set of criteria was urgently needed.<sup>51</sup> This was reflected in a recommendation made by the Senate Constitutional and Legal Affairs Committee in 1978 that a new Joint Committee on Scrutiny of Bills be established.<sup>52</sup> The initial scrutiny criteria recommended for the proposed joint committee were ambitious in scope and the recommendation was not well received at the time.<sup>53</sup> Despite this, support began to build for the new committee<sup>54</sup> and sometime later a compromise proposal was put. It involved the Senate Constitutional and Legal Affairs Committee undertaking the work of the proposed SSCSB for a six-month probationary period, applying a narrower range of scrutiny to mirror that of the SSCRO. This was accepted by the Parliament, and the scrutiny of Bills work commenced.<sup>55</sup> The early SSCSB was able to survive its probationary period, and became a separate committee. It also began to produce one of its most valued outputs, the Alert Digest.<sup>56</sup>

The late 1980s saw the beginning of a number of procedural reforms to the committee system, including changes in 1989 to provide for 'the systematic referral of bills to legislative and general purpose standing committees' through what became the Senate Standing Committee

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<sup>49</sup> Ibid 467.

<sup>50</sup> Dennis Pearce, 'Ten Years of Scrutiny' (Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills, Canberra, 25 November 1991) 4 <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Completed\\_inquiries](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries)>.

<sup>51</sup> Senator Alan Missen was one of these parliamentarians and the Chair of the Senate Constitutional and Legal Affairs Committee at that time. Ibid 5.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid; Barney Cooney, 'Ten Years of Scrutiny' (Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills, Canberra, 25 November 1991) 13–14. See also Grenfell, above n 38, 25.

<sup>54</sup> Senator Missen slowly built up support for the idea among a broader group of parliamentarians, including Senators Tate and Hamer. Pearce, above n 51.

<sup>55</sup> Ibid 6.

<sup>56</sup> The SSCSB's practice of issuing Alert Digest reports is discussed further below.

on the Selection of Bills.<sup>57</sup> The implementation of these reforms saw a rapid increase in the number of Bills referred to Senate Standing Committees for inquiry and report.<sup>58</sup> Then, in 1994, the previously separate Estimates and Senate General Purpose Standing Committees amalgamated. This gave rise to the system of ‘paired’ committees that we see today. Under this system, committees are allocated subject areas (such as legal and constitutional affairs) and perform functions of estimates and legislative and general-purpose standing committees. These pairs of committees include one with responsibilities for reviewing legislation (with government Chairs and government majorities) and the other for reference inquiries (with non-government Chairs and non-government majorities).<sup>59</sup> These pairs of committees are also supported by professional secretariat staff and sometimes external expert advisors.<sup>60</sup>

By the time the Howard Government won the 2004 federal election, the paired standing committee system had resulted in dozens of public hearings and numerous reports each year, compared with the much smaller handful of reports the committee system had procedure prior to the pairing reforms.<sup>61</sup> Bills were regularly referred to standing committees for inquiry – including at times to references committees, who often took a more critical approach to review and scrutiny.<sup>62</sup> The Howard Government responded by making changes to the system that would effectively revert to the pre-1994 arrangements. Instead of a system of ‘pairs’ of

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<sup>57</sup> Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) 76; see also Odgers, above n 3, 446–7. According to Senator Childs, the system also aimed to ‘replace some of the time-consuming debate in the committee of the whole by referring legislation to the appropriate standing committee where the relevant minister may, at times, be in attendance’: Bruce Childs, *The Truth About Parliamentary Committees*, Parl Paper No 18 (1992).

<sup>58</sup> Up from 30 Bills in the period 1970–80 to 279 Bills during the time between 1990 and 1996. See Odgers, above n 3, 446–7.

<sup>59</sup> Each committee was comprised of six Senators: three appointed by government, and the other three by the Leader of the Opposition in the Senate in consultation with independents and minor parties. The legislation committees had government-appointed Chairs with casting votes, assuring a government majority. In contrast, the references committees had non-government Chairs, and thus non-government majorities. Odgers, above n 3, 446–7.

<sup>60</sup> See, eg, Senate Standing Committees on Legal and Constitutional Affairs, *About this committee* (2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs)>.

<sup>61</sup> For example, during the period 2002–04 the Senate Standing Committees on Legal and Constitutional Affairs conducted a total of 23 inquiries (9 conducted by the References Committee and 14 by the Legislation Committee) compared with a total of 17 inquiries that were conducted by the committee during the entire period between 1987 and 1996.

<sup>62</sup> For example, from 1996 to 2005 legislation was referred to references committees on 146 occasions instead of legislation committees. Nick Minchin and Claire Moore, *Committees Under a Government-Controlled Senate: Lessons From 2005–08*, Parl Paper No 54 (2010).

committees, each standing committee would resume both legislative and general purpose functions and be chaired exclusively by a government member, effectively providing each committee with a government majority.<sup>63</sup> Unsurprisingly, this change was strongly opposed by the Labor opposition and the minor parties, who accused the government of ‘completely trashing the Senate committee system and destroying the accountability of government to the Senate’.<sup>64</sup> However the move did not appear to lead to a substantive decrease in committee inquiries into government Bills.<sup>65</sup> By 2009, the Rudd Government had reversed the relevant changes<sup>66</sup> and the refreshed ‘paired’ committee system was reflected in the Senate Standing Orders.<sup>67</sup> This remains the broad structure for the Senate standing committees operating today.

### C *Committees Examined in Detail in this Thesis*

#### 1 *Senate Scrutiny of Bills Committee*

##### (a) *Membership, Scrutiny Mandate and Outputs*

The modern SSCSB is established under Senate Standing Order 24, and comprises six Senators, three nominated by the government, and three members nominated by the opposition in consultation with any minor parties or independent senators.<sup>68</sup> The Chair of the SSCSB is appointed on the nomination of the Leader of the Opposition in the Senate and enjoys a casting vote.<sup>69</sup> The SSCSB is supported by a secretary, secretariat staff and an external legal advisor.

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> For example, under the ‘paired’ system, the Senate Standing Committees on Legal and Constitutional Affairs conducted 28 inquiries during the period December 2004 until March 2006. The ‘unpaired’ Legislation Committee then conducted 23 inquiries from September 2006 until October 2007.

<sup>66</sup> In 2008 the Senate Standing Committee on Procedure recommended reverting back to the post-1994 system of paired committees, but with some changes designed to limit the ‘doubling up’ of inquiries into the same Bill by legislation and references committees. Senate Standing Committee on Procedure, Parliament of Australia, *First Report 2008* (2008).

<sup>67</sup> Senate, Parliament of Australia, *Standing Order*, Chapter 5, Orders 17 to 39.

<sup>68</sup> Senate, Parliament of Australia, *Standing Order* 24(2)(a) (2017).

<sup>69</sup> SSCSB, Parliament of Australia, *Inquiry into the future direction and role of the Scrutiny of Bills Committee* (2012) [2.5].

Standing Order 24 also sets out the committee's scrutiny mandate.<sup>70</sup> It requires the SSCSB to consider whether Bills or Acts:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>71</sup>

The SSCSB has recently described its five scrutiny principles as broadly reflecting 'themes of good governance; administrative fairness and accountability; and parliamentary propriety (maintaining appropriate parliamentary engagement with the legislative process)'.<sup>72</sup> While the committee exercises its discretion when it comes to articulating the detail of its scrutiny criteria,<sup>73</sup> it has recently provided examples of some of the issues it has commented on with respect to the scrutiny principle relating to personal rights and liberties. These include the use of coercive powers; breaches of the privacy of individuals; the right to vote; the use of strict liability provisions; and the abrogation of the privilege against self-incrimination.<sup>74</sup> As will be

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<sup>70</sup> See Senate, Parliament of Australia, *Standing Orders* 23, 24.

<sup>71</sup> Unlike the SSCRO, the SSCSB does not produce guidance material detailing the content of the scrutiny principles it applies; however, since 2015 it has published an online newsletter *Scrutiny News*, along with its regular alerts and reports to 'highlight key aspects of the Senate Scrutiny of Bills Committee's work'. SSCSB, *Scrutiny News* (2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Scrutiny\\_News](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News)>.

<sup>72</sup> SSCSB, Submission to ALRC, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2014).

<sup>73</sup> Ibid. For example, in the committee's submission to the Australian Law Reform Commission's *Traditional Rights and Freedoms Inquiry*, it explained that '[I]t is also open to committee members (within the scope of standing order 24) and the Senate to determine the scope and focus of the committee's work. The committee is not constrained by any specific framework for determining matters falling within its principles (unlike, for example, the Parliamentary Joint Committee on Human Rights whose work is based in international human rights standards and jurisprudence).'

<sup>74</sup> SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 69, [3.5]. The SSCSB's heavy focus on legal process rights was noted by Evans and Evans in their 2006 study of Australia's parliamentary model of rights protection. For example, in their 2006–07 study on Australian parliaments and the protection of human rights, Evans and Evans observed that the SSCSB 'comments on one-half to two-thirds of the ICCPR issues raised by legislative proposals. It, and to an even greater extent its counterpart delegated legislation committee, are sometimes able to secure amendments to legislation to better secure protection of some rights and liberties. But

discussed further in Parts II and III, the types of rights the SSCSB focuses on, and the way it talks about rights, gives the committee particular advantages when it comes to having a strong hidden impact on counter-terrorism laws, and in contributing Australia's parliamentary model of rights protection.

When conducting its scrutiny work, the SSCSB employs a 'dialogue model' in which the committee and ministers 'communicate through correspondence published in the committee's publications'.<sup>75</sup> This is supported by the provision of swift legal analysis by the legal advisor to the committee, which forms the basis of the SSCSB's Alert Digest on the Bill.<sup>76</sup> This short summary report alerts the reader to the key issues or questions arising from the Bill relevant to the SSCSB's scrutiny criteria. This is then followed by a final report, which contains the committee's conclusions, having considered any responses it may have received from questions posed to the proponent Minister. The SSCSB's conclusions are generally couched in terms of 'raising scrutiny concerns with particular provisions of a Bill', and the committee regularly leaves the question of whether and how the provision should be amended 'to the Senate as a whole to consider'.<sup>77</sup> It very rarely recommends specific legislative amendments.

The requirement to scrutinise all Bills and legislative instruments gives rise to a heavy workload for the committee.<sup>78</sup> This means it can be difficult for the SSCSB to table its final report on a Bill prior to the completion of parliamentary debate. As discussed in Chapter 6, this

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its approach is narrowly focused on civil liberties issues and its coverage is far from complete.' Evans and Evans, above n 17.

<sup>75</sup> Senator Cooney, 'Ten Years of Scrutiny' (Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills, Canberra, 25 November 1991) 17–18. See also SSCSB, *Ten Years of Scrutiny – A Seminar to Mark the Tenth Anniversary of the Senate Standing Committee for the Scrutiny of Bills* (1991); ALRC, *Traditional rights and Freedoms report*, above n 71, [2.23]; SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 69, [3.5], [2.12]–[2.14].

<sup>76</sup> In 2017, the SSCSB began publishing its scrutiny comments on recently introduced Bills (including responses received on matters previously considered by the committee) in one report, the *Scrutiny Digest*. However, the *Scrutiny Digest* continues to be divided into initial reports on the Bill (previously called 'Alert Digests', now called 'Initial Scrutiny') and concluding reports on the Bill (previously called 'Reports' now called 'Commentary on Ministerial Responses'). See, eg, SSCSB, Parliament of Australia, *Scrutiny Digest No 7 of 2017* (21 June 2017).

<sup>77</sup> See e.g. SSCSB, Submission to the ALRC, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2014).

<sup>78</sup> For example, the SSCSB reported that: '[f]rom 2001 to 2011 the committee considered a total of 2524 bills and commented on 1144 or 45.3 per cent of these bills. During the same period 574 bills or 22.7 per cent of all bills were amended. Of the amended bills the committee commented on 125 amendments or 21.8 per cent.' SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 69, [2.25].



often depends on the SSCSB receiving a timely response from the relevant Minister to its requests for further information.<sup>79</sup>

To address these challenges, the SSCSB pushed for Standing Order 24 to be amended to empower the committee to ‘maintain on its website a list of bills in relation to which the committee has sought advice from the responsible minister and not yet received a response’.<sup>80</sup> The Standing Order was amended in November 2017 and also provides that, where the SSCSB has not been able to complete a final report on the Bill because a ministerial response has not been received, then any senator may ask the Minister for an explanation why a response was not received,<sup>81</sup> which can be followed by a motion without notice, recording the Minister’s response or failure to respond.<sup>82</sup>

In addition to producing and tabling Alert Digests and reports, the SSCSB also reports on matters which have been referred to it by the Senate, such as the 2006 Inquiry into Entry, Search and Seizure Provisions in Commonwealth Legislation,<sup>83</sup> and produces a regular ‘scrutiny news’ newsletter on key issues arising from its scrutiny work.<sup>84</sup>

As discussed further in Part III, one of the particular strengths of the SSCSB is the way it provides accessible analysis of a Bill to other committees, and to submission makers to inquiry-

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<sup>79</sup> See SSCSB, Submission to the ALRC, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2014). The SSCSB recently explained that: ‘Processes relevant to the committee’s work are substantially based on cooperation, and founded on expectations and practices the committee has built of the years in terms of requests for information and the desirability of being able to report fully before legislation is considered by Parliament. The scrutiny committee does not have any formal procedure measures available to it to ensure a timely response from Ministers (in contrast with the Regulations and Ordinances Committee, which can utilize the disallowance process under the Legislative Instruments Act 2003), and ultimately it is a question for the Senate and Parliament as a whole as to the final form of a bill as passed.’

<sup>80</sup> Senate, Parliament of Australia, *Standing Order* 24(1)(d) (17 November 2017). See also Interview with B (Canberra, 23 May 2016).

<sup>81</sup> Senate, Parliament of Australia, *Standing Order* 24(1)(e) (17 November 2017).

<sup>82</sup> Senate, Parliament of Australia, *Standing Order* 24(1)(f)–(g) (17 November 2017).

<sup>83</sup> This inquiry was one of only five public inquiries conducted by the SSCSB, the others being SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 70; SSCSB, Parliament of Australia, *Accountability and Standing Appropriations* (2005); SSCSB, Parliament of Australia, *The Quality of Explanatory Memoranda Accompanying Bills* (2004); SSCSB, Parliament of Australia, *Inquiry into absolute and strict liability offences in Commonwealth Legislation* (2002).

<sup>84</sup> SSCSB, *Scrutiny News* (2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Scrutiny\\_of\\_Bills/Scrutiny\\_News](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Scrutiny_News)>. Since October 1993, SSCSB has also issued annual reports and undertaken a monitoring role with respect to certain areas of legislative activity, including national scheme legislation and legislation that includes standing appropriations. SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 70, [2.14]–[2.15].

based committees. Since 2012, the SSCSB has been actively seeking to increase its communication with other parliamentary committees to ensure that they are alerted to issues raised by the SSCSB in a timely manner.<sup>85</sup> For example, since 2012 Standing Order 24 provides that the SSCSB's comments on Bills 'stand referred to legislation committees inquiring into those bills'.<sup>86</sup> The SSCSB also has 'informal, but effective, communication channels' to the SSCRO and the PJCHR,<sup>87</sup> and, as will be explored further in Part II, the work of the SSCSB features frequently in the submissions to and reports of the other committees.

*(b) A Technical Scrutiny Committee?*

The SSCSB has consistently seen its role as providing 'technical scrutiny' of proposed laws rather than an evaluation of the policy merits of each Bill. For example in 2012, the SSCSB said that it:

takes a strictly non-partisan, apolitical and consensual approach to its work, which has a significant influence on the capacity of the committee to meet its objectives. Such an approach is possible because the committee's usual practice is not to focus upon policy intent but to undertake a focused examination of legislation in light of Standing Order 24.<sup>88</sup>

As discussed further below, the SSCSB's 'technical scrutiny' character gives it broad legitimacy in the eyes of a range of key participants in the committee system and important strengths when it comes to influencing the pre-introduction development of laws.<sup>89</sup> However, it is important to keep in mind that this 'technical scrutiny' role is self-imposed, rather than prescribed by Standing Order 24. In fact, the Standing Order provides 'considerable latitude for the committee to reinterpret its role'.<sup>90</sup>

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<sup>85</sup> SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 70, [7.8]; SSCSB, Submission to ALRC, above n 79.

<sup>86</sup> SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 70, Recommendation 13; SSCSB, Submission to ALRC, above n 71.

<sup>87</sup> SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 70 [7.8]; SSCSB, Submission to ALRC, above n 71.

<sup>88</sup> SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 69, [2.10]. The committee recently reaffirmed this view in its submission to the ALRC: see SSCSB, Submission to ALRC, above n 79.

<sup>89</sup> See discussion in Chapter 4, Section B and Chapter 8.

<sup>90</sup> SSCSB, *Future direction and role of the Scrutiny of Bills Committee*, above n 70, [3.22].

Some key participants have debated whether the SSCSB's role should be confined to 'technical scrutiny', or whether it should serve a broader, social justice objective by preventing undue legislative interference with personal rights and liberties.<sup>91</sup> For example, when speaking at the tenth anniversary of the SSCSB, Uhr suggested that the committee could build upon its current role of 'adding to the total information bank available to the Senate [about a Bill]' by putting forward a 'preferred outcome, actually to fix things up'.<sup>92</sup> For Uhr, this would be a legitimate role for the SSCSB and necessary for the committee to maintain a relevant and respected role in Parliament.<sup>93</sup>

The technical scrutiny character of the SSCSB is considered in further detail in Parts II and III of my thesis, and is directly relevant to both the overall impact the committee system has on the development and content of case study Acts and rights protection in Australia.

## 2 *Parliamentary Joint Committee on Intelligence and Security*

The PJCIS is a statutory committee with origins that trace back to the 1970s. Since the establishment of ASIO, successive parliaments have been keen to ensure specific parliamentary oversight of the workings of Australia's key national security agencies, and the country's national security laws.<sup>94</sup> The need for parliamentary oversight became even more acute following the terrorist attacks in the United States on 11 September 2001,<sup>95</sup> and a number of specialist oversight bodies have since been established at the federal level, including the Parliamentary Joint Committee on the Australian Security and Intelligence Organisation, Australian Secret Intelligence Service and Defence Signals Directorate (the PJC on ASIO, ASIS and DSD), which was introduced to review and report on how intelligence agencies use

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<sup>91</sup> Ibid [3.26].

<sup>92</sup> John Uhr, 'Ten Years of Scrutiny' (Seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills, Canberra, 25 November 1991) 75, 81–2.

<sup>93</sup> Ibid 81–2.

<sup>94</sup> See Parliament of Australia, *History of the Intelligence and Security Committee* (2016) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/History\\_of\\_the\\_Intelligence\\_and\\_Security\\_Committee](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/History_of_the_Intelligence_and_Security_Committee)>. See also Commonwealth, Royal Commission on Intelligence and Security, *Final Report* (1977). See also Department of Prime Minister and Cabinet, *Independent Intelligence Review* (2017) 112–13.

<sup>95</sup> Philip Flood, *Report of the Inquiry into Australian Intelligence Agencies* (2004) 51 <<https://fas.org/irp/world/australia/flood.pdf>>. See also Department of Prime Minister and Cabinet, *Independent Intelligence Review* (2017) 112–13.

their powers.<sup>96</sup> In 2004 the powers of this committee were expanded to keep pace with legislative developments<sup>97</sup> and in 2005, the PJC on ASIO, ASIS and DSD was renamed the PJCIS.<sup>98</sup>

The functions of the PJCIS are prescribed by statute<sup>99</sup> and have changed regularly since the committee's establishment.<sup>100</sup> They broadly relate to reviewing the administration, expenditure and performance of the 'Australian Intelligence Community'<sup>101</sup> and reviewing the operation, effectiveness and implications of a number of specific national security laws.<sup>102</sup> The PJCIS is not authorised to initiate its own references, but may resolve to request the responsible Minister to refer a particular matter to it for review.<sup>103</sup> The PJCIS's membership is also prescribed<sup>104</sup>

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<sup>96</sup> In March 2002, the Parliamentary Joint Committee on the Australian Security and Intelligence Organisation, Australian Secret Intelligence Service and Defence Signals Directorate (the PJC ASIO, ASIS and DSD) was established, replacing the former Parliamentary Joint Committee on ASIO, which was provided for under the *Australian Security Intelligence Organisation Act 1979*. The committee's first report was *Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) which was followed by an annual report incorporating the committee's first review of administration and expenditure of the three intelligence agencies. See also Parliament of Australia, *History of the Intelligence and Security Committee* (2016)

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/History\\_of\\_the\\_Intelligence\\_and\\_Security\\_Committee](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/History_of_the_Intelligence_and_Security_Committee)>.

<sup>97</sup> For example, in March 2004, a provision was inserted into Part 5.3 of the *Criminal Code Act 1995* requiring the committee to review any regulation proscribing a 'terrorist organisation' and report to Parliament before the end of the 15-day disallowance period. The review of listing of terrorist organisations under the *Criminal Code* became a core activity of the committee into the 41<sup>st</sup> Parliament. See Parliament of Australia, *History of the Intelligence and Security Committee* (2016) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/History\\_of\\_the\\_Intelligence\\_and\\_Security\\_Committee](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/History_of_the_Intelligence_and_Security_Committee)>.

<sup>98</sup> See Flood, above n 95, 51.

<sup>99</sup> Part 4 of the *Intelligence Services Act 2001* (Cth) establishes the PJCIS and prescribes its membership and key functions. Schedule 1 of the Act provides further detail on how the PJCIS will go about its work.

<sup>100</sup> In the period between 2001 and 2015, the *Intelligence Services Act 2001* (Cth) was amended 20 times, expanding the mandate of the PJCIS considerably. For example, the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) amended s 29 of the *Intelligence Services Act 2001* (Cth) to require the PJCIS to review the operation, effectiveness and implications of ss 33AA, 35, 35AA and 35A of the *Australian Citizenship Act 2007*. Further changes to the mandate of the PJCIS were recommended by the Department of Prime Minister and Cabinet, *Independent Intelligence Review* (2017), 8–9, 118–25, Recommendations 21 and 23.

<sup>101</sup> The Australian Intelligence Community is comprised of ASIO, ASIS, Australian Geospatial-Intelligence Organisation (AGO), Defence Intelligence organisation (DIO), Australian Signals Directorate (ASD) and Office of National Assessments (ONA).

<sup>102</sup> These include the control order and preventative detention order regime, ASIO's questioning and detention powers, and the data retention regime. These reviews are discussed in further detail in Section D of this chapter.

<sup>103</sup> Section 29 of the *Intelligence Services Act 2001* (Cth) also sets out matters beyond the scope of the PJCIS, including reviewing the intelligence gathering and assessment priorities of the intelligence agencies.

<sup>104</sup> *Intelligence Services Act 2001* (Cth) Part 4, s 28(2), Schedule 1 Part 3.

and comprises 11 members (five Senators and six members of the House) with a government Chair<sup>105</sup> and a majority of government members.<sup>106</sup> PJCIS members must be nominated by the Prime Minister and the Leader of the Government in the Senate. Although regard must be had to the ‘desirability of ensuring that the composition of the Committee reflects the representation of recognised political parties in the Parliament’,<sup>107</sup> as at 2018 the membership of the PJCIS has been limited to Members and Senators from the major political parties. A secretary and professional secretariat staff support the PJCIS, including on occasion ‘seconded’ staff from law enforcement and intelligence agencies who provide technical assistance to the secretariat. Each member of the secretariat staff ‘must be cleared for security purposes to the same level and at the same frequency as staff members of ASIS’.<sup>108</sup> As discussed in Part II, this tightly controlled membership and access to specialist staff gives the PJCIS particular strengths when it comes to influencing key legislative decision makers and receiving government support for its recommendations. It has also given rise to concerns about the nature of the PJCIS’s relationship with law enforcement and intelligence agencies.

Like the LCA Committees, the PJCIS is an inquiry-based committee and has powers to call for witnesses and hold public and private hearings.<sup>109</sup> The PJCIS regularly makes direct contact with potential submission makers, including relevant government departments, law enforcement and intelligence agencies, independent statutory offices such as the Inspector General of Intelligence and Security (IGIS) and the Independent National Security Legislation Monitor (INSLM). However, unlike the other committees studied, the PJCIS has a specialist national security focus and a range of special powers that enable it to provide secure forums

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<sup>105</sup> The Chair of the PJCIS must be a government member elected by the members of the committee. *Intelligence Services Act 2001* (Cth) Schedule 1, 16. When the committee commenced in 2005 it was chaired by the Hon David Jull MP. By 2015, the Chair was Mr Dan Tehan MP.

<sup>106</sup> *Intelligence Services Act 2001* (Cth) Schedule 1, 14. Ministers, Speakers and Presidents of the Senate are not eligible to become members of the PJCIS. House members of the committee must be appointed by resolution of the House on the nomination of the Prime Minister, following consultation with non-government parties. Senate members of the committee are appointed by resolution of the Senate on the nomination of the Leader of the Government in the Senate, following consultation with each non-government political party that is represented in the Senate.

<sup>107</sup> *Intelligence Services Act 2001* (Cth) sch 1, 14(5).

<sup>108</sup> *Intelligence Services Act 2001* (Cth) sch 1, 21. There is no similar requirement that members of the committee also have security clearance; however, as noted above, members must be appointed in accordance with sch 1(14), which requires appointment via resolution of the House or Senate, upon the nomination of either the Prime Minister or Government Leader in the Senate.

<sup>109</sup> *Intelligence Services Act 2001* (Cth) sch 1, pt 1.

for the consideration of classified national security information.<sup>110</sup> In addition, the PJCIS must not publish in its report any operationally sensitive information or information that might prejudice Australia's national security.<sup>111</sup> These powers are supported by a range of offences for unauthorised disclosure of national security or operationally sensitive information.<sup>112</sup> There are also a range of secrecy provisions that apply specifically to the members and staff of the PJCIS.<sup>113</sup> As discussed in Part II, these special powers contribute to the PJCIS's strong legitimacy among government departments and agencies, and help explain its comparatively strong impact on the content of the case study Acts.

Like the LCA Committees, the PJCIS regularly cites the work of the SSCSB and the PJCHR in its reports and refers to the work of other parliamentary committees.<sup>114</sup> There are also many instances where the PJCIS has carefully considered the work of other independent reviews of counter-terrorism laws or national security agencies.<sup>115</sup> As discussed below, improving the collaborative capacity of the PJCIS is a focus of the reforms discussed in Part III of this research.

### 3 *Senate Standing Committees on Legal and Constitutional Affairs*

The LCA Committees were established in 1970 pursuant to Senate Standing Order 25 and take the form of a pair of committees – the Senate Legal and Constitutional Affairs *Legislation* Committee (the LCA Legislation Committee) and the Senate Legal and Constitutional Affairs

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<sup>110</sup> For example, pt 1 of sch 1 of the *Intelligence Services Act 2001* (Cth) provides that the PJCIS must *not* require a person or body to disclose to the committee operationally sensitive information or information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations.

<sup>111</sup> The PJCIS is required to seek and follow the Minister's advice on these matters prior to the publication of its reports. *Intelligence Services Act 2001* (Cth) sch 1, 7

<sup>112</sup> For example, under sch 1, cls 9–13 of the *Intelligence Services Act 2001* (Cth) it is an offence to disclose or publish any evidence taken by the committee in a review conducted in private unless the disclosure is authorised in writing by the relevant agency head or has already been lawfully disclosed.

<sup>113</sup> For example, sch 1, cl 12 of the *Intelligence Services Act 2001* (Cth) provides that the disclosure of any information acquired through being a member or staff member of the PJCIS for purposes other than the PJCIS's function is an offence punishable by up to two years imprisonment.

<sup>114</sup> At times this can also include the Parliamentary Joint Committee on Law Enforcement, established in December 2013 to review the activities, functions and powers of the Australian Crime Commission and the Australian Federal Police. *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) s 5.

<sup>115</sup> These include independent reviews conducted by the Council of Australian Governments, the Inspector-General of Intelligence and Security, the Independent National Security Legislation Monitor and independently appointed committees such as the Sheller Committee Review. These reviews are discussed in further detail in Chapter 5, Section A(5).

*References Committee* (the LCA References Committee) – each with a related but different mandate and membership. Both LCA Committees have six members and contain at least one member nominated by minority parties and/or independent senators.<sup>116</sup> The LCA Legislation Committee has a government Chair with a casting vote (and therefore a government majority) and the LCA References Committee is chaired by a non-government Senator (providing it with a non-government majority).<sup>117</sup> Standing Order 25 also provides that other Senators can be appointed to the LCA Committees as substitutes for existing committee members<sup>118</sup> or as ‘participating members’ for particular inquiries.<sup>119</sup> As discussed further in Chapter 4, this gives the LCA Committees particular strengths when it comes to engaging a diverse range of Senators, who in turn help to encourage a broad range of submission makers and witnesses to the committees’ public inquiries. A secretary and professional secretariat staff support the LCA Committees, generally without an external legal advisor.

Unlike the SSCSB, the LCA Committees are not required to review every Bill introduced into Parliament. Instead, the LCA Committees inquire into matters *referred to them* by the Senate. The LCA Legislation Committee is responsible for consideration of Bills, estimates processes, and departmental matters. The LCA References Committee deals with thematic or issues-based references from the Senate, which since 2008 generally do not include consideration of the provisions of particular Bills.<sup>120</sup> Both LCA Committees receive guidance from the Senate about the focus of its inquiry and reporting times. This means that, in practice, it is the Senate Standing Committee for the Selection of Bills that determines the workload of the LCA Legislation Committee.<sup>121</sup>

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<sup>116</sup> Senate, Parliament of Australia, *Standing Order 25* (2000).

<sup>117</sup> Senate, Parliament of Australia, *Senate Standing Orders* 25(10) (2000). As at 2001, the References Committee was chaired by ALP Senator J McKiernan and the Legislation Committee was chaired by New South Wales Liberal Senator Marise Payne. By 2015, the Chair of the Legislation Committee was Queensland Liberal Party Senator the Hon Ian Macdonald and the Reference Committee was chaired by Australian Greens South Australian Senator Penny Wright until June 2015, when she was replaced by Independent Queensland Senator Glenn Lazarus.

<sup>118</sup> Senate, Parliament of Australia, *Senate Standing Orders* (2000) 25(7).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid* 25(2).

<sup>121</sup> The Senate Standing Committee for the Selection of Bills Committee was set up in 1988 and is effectively a committee of whips. It comprises the Government Whip and two other senators nominated by the Leader of the Government in the Senate, the Opposition Whip and two other senators nominated by the Leader of the Opposition in the Senate, and the whips of any minority groups. A member of the Selection of Bills Committee, typically a

One of the key strengths of the LCA Committees is their ability to conduct public inquiries into the Bills or issues referred to them by the Senate.<sup>122</sup> The first step in the inquiry process is to call for written submissions through advertising its inquiry in national newspapers and online, as well as by directly approaching a range of potentially interested parties, including legal bodies, government departments and independent statutory bodies.<sup>123</sup> The LCA Committees then select a range of submission makers to attend a public or private hearing and provide further oral evidence and answer the committee members' questions.<sup>124</sup> As a report marking the first 20 years of the LCA Committees observed:

Because they can travel around Australia in the course of their inquiries, the Legislative and General Purpose Standing Committees literally take Parliament to the people. In this way they gather information from interested members of the public and from experts and specialists.<sup>125</sup>

After the inquiry process is complete, the LCA Committees prepare a report to be tabled in the Senate typically containing a number of specific recommendations for amendments to the Bill or policy proposal, as well as an overview of the key issues raised during the inquiry. Unlike the SSCSB, whose reports are almost invariably consensus reports, the LCA Committees'

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non-government Senator, 'proposes that a bill be referred to a committee, giving reasons for referral, nominating a committee and a possible reporting date, and suggesting witnesses from whom submissions or evidence may be obtained'. Subject to agreement by the rest of the committee, the Bill is then recommended for referral in the committee's report to the Senate. Senate, Parliament of Australia, *Standing Order* 24A (13 February 1997). For further information see Senate Standing Committee for the Selection of Bills Committee, *About the committee* (2017) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Selection\\_of\\_Bills](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Selection_of_Bills)>; Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) 76–8.

<sup>122</sup> Matters for inquiry by legislative and general purpose standing committees are usually referred in accordance with the procedure outlined in Senate, Parliament of Australia, *Standing Order* 25(1) (15 July 2014). See Odgers, above n 3, 491–3. Once a Bill has been referred to one of the LCA Committees and a report date set, the LCA Committees have a range of inquiry powers at their disposal including the power to send for persons and documents; hold public or private hearings around the country (with public hearings recorded in Hansard); report on its proceedings and evidence taken and any recommendations made; and authorise the broadcasting of its public hearings, under such rules as the Senate provides. Senate, Parliament of Australia, *Standing Orders* 25(14)–(19) (15 July 2014). Parliamentary privilege applies to protect witnesses to the committees from legal liability, harm or intimidation. See also Senate Legislative and General Purpose Standing Committees, Parliament of Australia, *The First 20 Years 1970–1990* (1990) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Significant\\_Reports/first20years/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Significant_Reports/first20years/index)>.

<sup>123</sup> These categories of submission makers have been described as the 'usual suspects' and are discussed in further detail in Chapter 4.

<sup>124</sup> As discussed further in Parts II and III, the LCA Committees provide an important deliberative forum for meaningful public engagement with a proposed law or policy issue.

<sup>125</sup> SLGPSC, *The First 20 Years*, above n 122.



reports regularly include dissenting or additional comments by opposition or minor party committee members.

Unlike the SSCSB or the PJCHR, the LCA Committees are not required to apply any particular analytical framework or rights-scrutiny criteria when undertaking an inquiry into a Bill or other matter. Despite this, common themes are evident in the approach of the LCA Committees, and in particular the LCA Legislation Committee. These themes are largely informed by the approach adopted by the most regular and influential submission makers to the LCA Committees, and commonly involve rights issues, even if they are not always expressed with reference to international human rights law.<sup>126</sup> As explored further in Chapter 6, the themes commonly explored by the LCA Committees when reviewing the case study Acts include: consideration of relevant constitutional doctrines, particularly the doctrine of separation of powers; the preservation of a meaningful oversight role for Parliament over the exercise of executive power; consideration of relevant ‘rule of law’ principles; and the need to justify any significant departure from established criminal law and common law principles.

The LCA Committees have a number of informal ways of liaising with other parliamentary committees, particularly those who share responsibilities for scrutinising Bills, such as the SSCBC and the PJCHR.<sup>127</sup> However, the LCA Committees’ relationship with other inquiry-based committees can be complex. Since the procedural reforms in the 2000s, efforts have been made to reduce the potential for more than one parliamentary committee to consider the same Bill or reference at the same time.<sup>128</sup> In addition, since 2013, there has been a strong tendency among government Chairs of the LCA Legislation Committee to decline to inquire into counter-terrorism or national security Bills that are also subject to inquiry by the PJCIS. The

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<sup>126</sup> Evans and Evans, above n 17. In their 2006 (pre PJCHR) study of the role of the Australian Parliament in the protection and promotion of human rights, Evans and Evans observe: ‘The Legal and Constitutional Legislation Committee’s approach to bills appears to be influenced by the number and tenor of the submissions it receives. Human rights orientated submissions inflect the reports it makes. But even when the Committee receives numerous substantial submissions examining human rights issues, which it faithfully recounts in its report, the Committee rarely expresses its own reasoning and conclusions in the language of human rights.’

<sup>127</sup> As will be explored further in Chapter 6, submission makers to the LCA Committees, particularly the Legislation Committee, regularly cite the work of the SSCSB and the PJCHR and the work of these committees is often referred to in the LCA Committees’ reports.

<sup>128</sup> For example, Senate Standing Order 25(13) provides that the LCA Committees should ‘take care not to inquire into any matters which are being examined by a select committee of the Senate appointed to inquire into such matters and any question arising in this connection may be referred to the Senate for determination’. Senate, Parliament of Australia, *Standing Order* 25(13) (15 July 2014).

evidence presented in Part II of this thesis suggests that, while this is understandable, these efforts to avoid multi-committee inquiries into national security laws may dilute the potential for the committee system to have a rights-enhancing impact. For these reasons, Part III explores options for improving the opportunities for the inquiry-based committees to work efficiently and collaboratively when it comes to reviewing rights-engaging laws such as those relating to counter-terrorism.

#### 4 *Parliamentary Joint Committee on Human Rights*

##### (a) *Membership, Mandate and Outputs*

The newest parliamentary committee evaluated in this thesis is the PJCHR. As noted in Chapter 1, this committee was established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Parliamentary Scrutiny Act)<sup>129</sup> as part of the Rudd Government's response to the 2008–09 National Consultation.<sup>130</sup> Under the Parliamentary Scrutiny Act, the PJCHR must examine Acts, Bills and legislative instruments for compatibility with human rights<sup>131</sup> and inquire into any matter relating to human rights which is referred to it by the Attorney-General.<sup>132</sup>

The PJCHR's membership is also prescribed and comprises of 10 members, five appointed by the Senate and five appointed by the House. The PJCHR has a government Chair with a casting vote.<sup>133</sup> A secretary, professional secretariat staff and an external legal adviser assist the committee.<sup>134</sup>

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<sup>129</sup> The *Human Rights (Parliamentary Scrutiny) Act 2011* also introduced the requirement for all Bills and disallowable instruments to be introduced with a Statement of Compatibility with Human Rights.

<sup>130</sup> As discussed in Chapter 1, the establishment of the PJCHR was a key element of Australia's Human Rights Framework, which was launched in April 2010 as part of the Rudd Government's response to the recommendations of the 2009 National Consultation on Human Rights. Commonwealth of Australia, *Australia's Human Rights Framework* (2010) <<https://www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>>.

<sup>131</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.

<sup>132</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7.

<sup>133</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 5. Ministers, House Speakers and Senate Presidents (and their Deputies) are not eligible for appointment. The inaugural Chair of the PJCHR was Mr Harry Jenkins MP. As at 2015, the Chair of the committee was the Hon Phillip Ruddock MP.

<sup>134</sup> The PJCHR's first legal adviser was Professor Andrew Byrnes, followed by Professor Simon Rice and more recently by Sydney Barrister Dr Aruna Sathanapally. PJCHR, Parliament of Australia, *Annual Report 2012–13* (2013) [1.15].

In practice, the most frequent role of the PJCHR is to table reports on the human rights compatibility of a proposed Bill or legislative instrument.<sup>135</sup> The ‘human rights’ referred to in the Parliamentary Scrutiny Act are those rights listed in seven core human rights conventions to which Australia is a party.<sup>136</sup> These rights total over 100 in number, which posed a challenge for the new committee. However, having operated for a number of years, it appears that a smaller handful of rights consistently make up the majority of the PJCHR’s detailed scrutiny work.<sup>137</sup>

Like the SSCSB, it is common for the PJCHR to express a view on a Bill’s compatibility with its scrutiny criteria, but leave the question of amending or removing a particular provision to Parliament as a whole to consider. Less frequently, the PJCHR makes specific recommendations for amendment to ensure the compatibility of the legislation with Australia’s human rights obligations.<sup>138</sup> Like the SSCSB, the PJCHR considers *all* Bills and legislative instruments introduced to Parliament and faces a heavy and unrelenting workload.<sup>139</sup>

In order to manage its heavy workload and maximise its capacity to table its reports prior to the conclusion of parliamentary debate or the requisite disallowance period, the PJCHR has developed strategies for prioritising its work that centre around categorising Bills and

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<sup>135</sup> See, eg, PJCHR, Parliament of Australia, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017).

<sup>136</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3. These are *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, [1975] ATS 40; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, [1976] ATS 5; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23; *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, [1983] ATS 9; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, [1989] ATS 21; *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1991] ATS 4; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, [2008] ATS 12.

<sup>137</sup> For example, the PJCHR’s 2013–14 annual report describes the following commonly engaged human rights identified in legislation during this period: rights to and at work; right to a fair trial; right to privacy; right to a fair hearing; right to social security; right to an adequate standard of living; and right to health. The annual report provides that during 2013–14 the above seven rights accounted for 58 per cent of rights engaged within both primary and delegated legislation. PJCHR, Parliament of Australia, *Annual Report 2013–14* (2016) [3.5]–[3.6].

<sup>138</sup> *Ibid* [2.11]

<sup>139</sup> See, eg, Harry Jenkins, ‘Human Rights Are in Our Hands’ (Speech delivered at Australian Human Rights Commission, Human Rights at Your Fingertips, Online and in Practice, Sydney, 29 October 2012); Ursula Stephens, ‘Parliamentary Joint Committee on Human Rights’ (Remarks delivered at University of Melbourne, Human Rights Class, Melbourne, 29 April 2013).

legislative instruments on the basis of the significance of the human rights issues they raise.<sup>140</sup> However, despite these strategies, the PJCHR is not always able to table its scrutiny reports prior to the conclusion of the second reading debate on the relevant Bill.

As discussed in Chapter 6, two factors contribute to the occasional delay in tabling PJCHR reports. The first is procedural and arises from the fact that the PJCHR is a *joint* committee. This means that the PJCHR typically meets when both the House and the Senate are sitting, and the Chair tables the committee's reports after each of these meetings.<sup>141</sup> This means that PJCHR scrutiny reports may not be tabled in weeks when the Senate alone is sitting and debating Bills.<sup>142</sup> The second factor relates to the PJCHR's practice of waiting to receive a response to its requests for further information from the proponent Minister before tabling its reports.<sup>143</sup> Unlike the SSSCB, which sets out its preliminary concerns with a Bill in the form of a short Alert Digest, at least until recently the PJCHR has typically only issued a concluded scrutiny report on a Bill that includes excerpts from any response received from the proponent Minister to requests for further information.<sup>144</sup> Under this approach, the PJCHR sets out its concerns with respect to a Bill in correspondence to the proponent Minister and allows the Minister to respond *before* the PJCHR tables its report. This 'behind-closed-doors' exchange of correspondence between the committee and the proponent of the Bill on issues arising from the SoC is seen by some as central to the human rights 'dialogue' the committee is tasked with creating.<sup>145</sup> However, unless the proponent Ministers respond swiftly to the PJCHR's

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<sup>140</sup> These strategies were outlined in PJCHR, *Annual Report 2013–14*, above n 137, [1.19], [2.15]–[2.17] and Table 3.1: Legislation considered during the reporting period.

<sup>141</sup> Ibid [2.2]

<sup>142</sup> For example in 2012 there were three weeks when the House of Representatives was sitting when the Senate was not and two weeks when the Senate was sitting when the House was not (out of a total of 20 sitting weeks). See Parliamentary of Australia, *Sitting Calendar 2012, Work of the Parliament* (2012) <[http://www.aph.gov.au/About\\_Parliament/Sitting\\_Calendar/Sitting\\_2012](http://www.aph.gov.au/About_Parliament/Sitting_Calendar/Sitting_2012)>.

<sup>143</sup> However, as discussed in Parts II and III, this practice may be changing. For example, the PJCHR's 2013-14 annual report explains that the PJCHR may publish an initial report setting out its concerns, and seeking further information from the Minister responsible for the Bill. It will then consider this response, and publish it alongside the PJCHR's concluding report on the matter. PJCHR, *Annual Report 2013–14*, above n 137, [2.10]–[2.11]. This practice of publishing initial scrutiny concerns followed by the final views of the committee features in the recommendations made in Chapter 10.

<sup>144</sup> Further discussion of this practice is contained in Chapters 6 and 8. See also PJCHR, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament* (2015).

<sup>145</sup> As the current Chair of the committee has explained, through this formal correspondence with the proponent of the Bill or instrument the PJCHR is able to contribute to its aim of ensuring appropriate consideration of human

correspondence, this approach can leave the Parliament without the benefit of the PJCHR's analysis of a Bill during the critical second reading stage.<sup>146</sup>

As discussed further below, my research suggests that this delay in the publication of the PJCHR's analysis of a Bill is having a negative impact on the committee's capacity to influence legislative outcomes. For this reason, in Part III of my research I recommend that the PJCHR consider adopting Alert Digest style reporting, such as that used by the SSSCB, along with a number of other strategies to improve the timeliness and accessibility of its reports.

In addition to tabling reports on Bills and legislative instruments, the PJCHR has also published a *Guide to Human Rights*<sup>147</sup> and two Guidance Notes: *Drafting statements of compatibility*,<sup>148</sup> and *Offence provisions, civil penalties and human rights*.<sup>149</sup> These materials reflect the PJCHR's approach to assessing human rights compliance, which, although drawn from international law principles, aims to be 'practical' and contextualised for the Australian experience.<sup>150</sup> These Guidance Notes are directed primarily at public servants responsible for drafting and preparing SoCs and, as discussed further in Part III, provide a foundation on which to improve the PJCHR's overall impact on the content and development of proposed laws.

#### (b) A 'Dialogue-Creating' Committee?

Although it has the power to hold public inquiries and receive private briefings,<sup>151</sup> in its work practices the PJCHR has generally based itself on the 'technical scrutiny' approach of the

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rights issues in legislative and policy development: PJCHR, Parliament of Australia, *Chair's Tabling Statement* (11 October 2016).

<sup>146</sup> The PJCHR cited the timeliness of responses to its requests for information as an issue of concern, with only eight of the 58 requests for information provided to the committee by the requested date. See 'Figure 3.2: Percentage of responses received by due date' in PJCHR, *Annual Report 2013–14*, above n 137, [3.26].

<sup>147</sup> PJCHR, *Annual Report 2012–13*, above n 134, [2.26].

<sup>148</sup> PJCHR, Parliament of Australia, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)>.

<sup>149</sup> PJCHR, Parliament of Australia, *Guidance Note 2: Offence provisions, civil penalties and human rights* (December 2014) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)>.

<sup>150</sup> Ursula Stephens, 'Opening Remarks' (Speech given at the Australian Government and Non-Government Organisations Forum on Human Rights, Old Parliament House, Canberra, 19 June 2013).

<sup>151</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(c) provides that the PJCHR has the power 'to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and to report to

SSCSB and does not actively advertise for, or request, written submissions on the Bills it considers.<sup>152</sup> The PJCHR has also been particularly keen to foster a close working relationship with the SSCSB and the SSCRO<sup>153</sup> and this has evolved to include ‘sharing’ certain secretariat staff and functions.<sup>154</sup>

Successive PJCHR Chairs have also underscored the ‘technical’ character of the committee<sup>155</sup> and in its 2015 *Guide to Human Rights* publication, the PJCHR clearly states that it ‘undertakes its scrutiny function as a technical inquiry relating to Australia’s international human rights obligations’ and ‘does not consider the broader policy merits of legislation’.<sup>156</sup> On this view, the human rights ‘dialogue’ the PJCHR seeks to create with the executive is based on the preparation and consideration of SoCs and the correspondence exchanged between the committee and the proponent of the Bill or instrument being scrutinised.

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both Houses of the Parliament on that matter’. The PJCHR used this power in 2017: see PJCHR, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017).

<sup>152</sup> However, the PJCHR has repeatedly said that it ‘welcomes correspondence’. PJCHR, *Annual Report 2012–13*, above n 134, [1.18]. The PJCHR website includes the following: ‘Parliamentarians, interested groups and other stakeholders who wish to bring matters to the committee’s attention that are relevant to its functions under the Act are invited to do so.’ Parliament of Australia, *Parliamentary Joint Committee on Human Rights*, Parliament of Australia (2016) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights)>. It is also noted that on occasion the PJCHR has used its inquiry powers with respect to specific Bills: for examples see PJCHR, *Annual Report 2012–13*, above n 134 and discussion in n 159 below.

<sup>153</sup> The PJCHR’s 2012–13 annual report explains that: ‘Soon after the establishment of the [PJCHR], the Chair and Deputy Chair met with both Senate scrutiny committees and the three committees agreed to establish a practice of writing to each other to draw attention to comments on particular bills and instruments. On an informal level the three secretariats work closely together within the Senate Legislative Scrutiny Unit.’ PJCHR, *Annual Report 2012–13*, above n 134, [1.32].

<sup>154</sup> See also Tom Campbell and Stephen Morris, ‘Human rights for democracies: a provisional assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011’ (2015) 34(1) *University of Queensland Law Journal* 7; Adam Fletcher, ‘Human Rights Scrutiny in the Australian Parliament’ (Paper presented at ‘Evaluating Inquests, Commissions and Inquiries’ Symposium, La Trobe University, Melbourne, 1 November 2017).

<sup>155</sup> For example, at the beginning of the 45<sup>th</sup> Parliament the incoming PJCHR Chair observed that the role of the PJCHR is to engage in ‘technical examination’, not to ‘assess the broader merits or policy objectives of particular measures’. PJCHR, Parliament of Australia, *Report 7 of 2016* (2016). See also Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

<sup>156</sup> PJCHR, Parliament of Australia, *Guidance Note 1: Drafting Statements of Compatibility* (December 2014) ii. See also PJCHR, *Annual Report 2013–14*, above n 137, ch 2.

However, some commentators suggest that the PJCHR should play a more active role in directly engaging the Australian community on human rights issues.<sup>157</sup> These commentators often point to the legislation establishing the PJCHR, which clearly provides that the committee has the power to hold public inquiries<sup>158</sup> into human rights matters referred to it and into existing Acts or proposed Bills.<sup>159</sup> This broader community engagement role is also said to be reflected in the second reading speech of the proponent of the Parliamentary Scrutiny Act, the then Attorney-General, the Hon Robert McClelland MP, who said:

[T]he new parliamentary committee will establish a dialogue between the parliament and its citizens whereby the members of the committee can canvass the views of the public, including affected groups, as to how they will be affected by proposed legislation.

In that sense, these measures incrementally advance the concept of participatory democracy by providing additional means for citizens to have input into the legislative process.<sup>160</sup>

For some scholars, the PJCHR's lack of broader public engagement when undertaking its Bills scrutiny is a sign of its lack of effectiveness as a rights-protecting mechanism.<sup>161</sup> As outlined in Part III, I take a different view. This is because the evidence collected in Part II suggests that the best way for the PJCHR to improve its rights-enhancing impact on proposed legislation is

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<sup>157</sup> See, eg, George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58; Rosalind Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23(2) *Public Law Review* 75; Dan Meagher, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and the Courts' (2014) 42 *Federal Law Review* 1; Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *AIAL Forum* 13; Edward Santow, 'The Act that Dares Not Speak Its Name: the National Human Rights Consultation Report's Parallel Roads to Human Rights Reform' (2010) 33(1) *University of New South Wales Law Journal* 8; James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *Australian Institute of Administrative Law* 13.

<sup>158</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(c).

<sup>159</sup> As the PJCHR noted in its 2012–13 annual report: 'While the speed with which the committee must work means that its analysis of legislation is primarily done on the papers, from time to time the committee has found it beneficial to hold public hearings. The committee held three public hearings during the year: one as part of its examination of the Social Security Legislation Amendment (Fair Incentives to Work) Bill 2012 and two as part of its examination of the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* and related legislation. In the case of the Social Security Bill, the committee's hearing provided an avenue for it to place evidence regarding the human rights issues raised by the bill on the public record, and therefore available to the Parliament, in the shortest possible timeframe.' PJCHR, *Annual Report 2012–13*, above n 134, [1.16].

<sup>160</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271 (Robert McClelland, Attorney-General).

<sup>161</sup> See, eg, George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

to invest further in its ‘technical scrutiny’ role, rather than seek to emulate the work practices of inquiry-based committees. This is explored further in Part III.

## 5 *Non-Parliamentary Scrutiny Bodies*

Although my research evaluates the rights-enhancing impact of parliamentary committees, a number of non-parliamentary review mechanisms also played an influential role in the development of the case study Acts and contribute in direct and indirect ways to Australia’s parliamentary model of rights protection.<sup>162</sup> They include:

- the INSLM<sup>163</sup> established in 2011 to review and report on the operation, effectiveness and implications of Australia’s counter-terrorism and national security legislation on an ongoing basis, including the impact of these laws on individual rights.<sup>164</sup> When carrying out his or her functions, the INSLM is required to have regard to Australia’s obligations under international agreements, including human rights obligations.<sup>165</sup>
- the IGIS, an independent statutory office holder who is authorised to review the activities of the Australian Intelligence Community ‘to ensure that the agencies act legally and with propriety, comply with ministerial guidelines and directives and respect human rights’;<sup>166</sup>

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<sup>162</sup> For an example of consideration of the rights protective role of ‘integrity’ institutions, such as the Commonwealth Ombudsman and the Australian Human Rights Commission, see Gabrielle Appleby, ‘Horizontal Accountability: The Rights Protective Promise and Fragility of the Executive Integrity Institutions’ (2017) 23 *Australian Journal of Human Rights* 168.

<sup>163</sup> The Independent National Security Legislation Monitor Bill 2010 (Cth) was passed on 18 March 2010 and assented to on 13 April 2010.

<sup>164</sup> *Independent Monitor of National Security Information Act 2010* (Cth) Part II. The Monitor is also responsible for considering if counter-terrorism and national security laws remain necessary and are proportionate to any threat of terrorism or to national security. See Australian Government, *About the Independent Monitor of National Security Information*, Independent Monitor of National Security information (2017) <<http://www.inslm.gov.au/>>.

<sup>165</sup> *Independent Monitor of National Security Information Act 2010* (Cth) s 8.

<sup>166</sup> The functions of the IGIS are prescribed under the *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 8, 9, 9A. The IGIS can undertake a formal inquiry into the activities of an Australian intelligence agency in response to a complaint or a reference from a Minister or act independently to initiate inquiries and conduct regular inspections and monitoring of agency activities. Office of the Inspector-General of Intelligence and Security, *About IGIS*, Australian Government (2016) <<https://www.igis.gov.au/about>>.



- the Australian Human Rights Commission (AHRC), with an explicit statutory mandate to provide advice about the human rights compliance of Australia's federal laws, including counter-terrorism laws;<sup>167</sup>
- the Commonwealth Ombudsman who is tasked with investigating complaints about the administrative actions of federal departments and agencies, including the Australian Federal Police (without an explicit human rights mandate);<sup>168</sup> and
- the Council of Australian Governments (COAG), which has played an important role in the development and review of Australia's counter-terrorism laws, particularly in the context of considerations of the referral of state powers and the enactment of complementary state and territory laws. COAG invests its specialist committees with specific mandates which can include the consideration of the human rights implications of proposed or existing counter-terrorism laws.<sup>169</sup>

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<sup>167</sup> *Australian Human Rights Commission Act 1986* (Cth). The AHRC has a range of statutory responsibilities, many relating to the resolution of discrimination and human rights complaints, but it is also empowered to provide independent legal advice to assist courts in cases that involve human rights principles and monitor human rights compliance. The AHRC has also produced a range of materials on human rights issues arising in the context of counter-terrorism laws, including Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter Terrorism Laws* (2008) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/counter-terrorism-and-human-rights>>.

<sup>168</sup> *Ombudsman Act 1976* (Cth). Overtime the role has expanded to include special responsibilities for complaints relating to the Australian Federal Police and for inspecting the records of law enforcement and other enforcement agencies in relation to the use of covert powers, including telecommunications interceptions, stored communications, telecommunications data, surveillance devices and controlled operations. Commonwealth Ombudsman, *Ombudsman Our Legislation*, Australian Government (2017) <<http://www.ombudsman.gov.au/pages/our-legislation/>>.

<sup>169</sup> COAG has members from each Australian government, including the Prime Minister, state and territory Premiers and Chief Ministers and the President of the Australian Local Government Association. The decisions of COAG are reflected in communiqués or sometimes including National Agreements and National Partnership Agreements. For example, in 2004, Australia revised its National Counter-Terrorism Arrangements and through an Intergovernmental Agreement established the National Counter-Terrorism Committee (NCTC). The Agreement reached by COAG was: 'to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power so that the Commonwealth may enact specific, jointly-agreed legislation.' Council of Australian Governments, *Agreement on Counter-terrorism Laws* (25 June 2004) 1. <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/IntergovernmentalAgreementonCounterTerrorismLaws.pdf>>

In addition to these bodies, a number of inquiries have been specifically established to examine, review and report on various aspects of Australia's counter-terrorism laws.<sup>170</sup> The relationship between these review bodies and the parliamentary committee system is described in further detail in Chapter 6.

#### D Counter-Terrorism Law Making in Australia

The next part of this chapter describes the key tranches of counter-terrorism law making between the period 2001 to 2015, setting the scene for the evaluation in Part II of the legislative, public and hidden impact of the parliamentary committees described above on the twelve case study Acts.

Summarising the experience of counter-terrorism law making in Australia is a daunting task,<sup>171</sup> and I do not aim to provide a comprehensive overview of even the most significant domestic and international developments that have given rise to one of the most prolific areas of federal legislative activity in recent decades.<sup>172</sup> Rather, I introduce the twelve case study Acts<sup>173</sup> within the context of five key tranches of counter-terrorism law making in order to provide some

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<sup>170</sup> See, eg, Australian Law Reform Commission, *Fighting Words: A Review of Seditious Laws in Australia*, Report No 104 (2006); Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006); Mark John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008).

<sup>171</sup> Of the scholars who have accepted this challenge, Professor George Williams is perhaps the most prolific and comprehensive: see, eg, George Williams, Andrew Lynch and Nicola McGarrity, *Inside Australia's Anti-Terrorism Laws and Trials* (New South Publishing, 2015); George Williams, Andrew Lynch and Nicola McGarrity, *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010); George Williams and Andrew Lynch, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006); George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136.

<sup>172</sup> Since 2001 the Commonwealth Parliament has passed over 50 separate pieces of legislation dealing with terrorism and security. See Attorney-General's Department, *Australia's Counter-terrorism Laws*, Australian Government (2016) <<http://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Pages/AustraliascounterterrorismLaws.aspx>>. See also Williams, 'A Decade of Australian Anti-Terror Laws', above n 171. Australia's national security agencies have also proliferated in size and number and received continual increases in resources. For example, a 2017 Independent Intelligence Review reported that, as of 2017, there were 10 separate intelligence agencies with a combined annual budget 'approaching \$2 billion and about 7,000 staff'. Department of Prime Minister and Cabinet, *Independent Intelligence Review* (2017) 7–8.

<sup>173</sup> One of the case study 'Acts', the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) is more correctly described as a Bill as it was not enacted into legislation. As discussed further below, this Bill is included in the case study Acts as it was subject to rigorous multi-committee scrutiny and preceded the enactment of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth).

context for why these Acts were introduced, and why they make particularly compelling case studies.<sup>174</sup> These Acts are:

- *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (and related Acts) (SLAT Acts, CSA 1).
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (Cth) (CSA 2);
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) (CSA 3);
- *Anti-terrorism Act 2004* (Cth) (CSA 4);
- *National Security Information (Criminal Proceedings) Act 2004* (Cth) (CSA 5);
- *Anti-Terrorism Act (No 2) 2005* (Cth) (Control Orders Act, CSA 6);
- *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act, CSA 7);
- *National Security Legislation Amendment Act 2010* (Cth) (CSA 8);
- *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) (Data Retention Act, CSA 9);
- *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth) (CSA 10);
- *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (Foreign Fighters Act, CSA 11); and
- *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) (Citizenship Act, CSA 12).

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<sup>174</sup> Further detail of the substantive provisions of these Acts is provided in Chapter 5.

# 1 *The First Tranche: The Howard Government's Response to 'September 11' (2001–2003)*

Prior to 11 September 2001 there were no specific terrorism offences in federal legislation.<sup>175</sup> However, Australia had an extensive range of laws at the state and territory level that addressed many of the criminal acts associated with terrorist activity.<sup>176</sup> For example, politically motivated violence was already an offence<sup>177</sup> and a range of other relevant criminal offences existed at the state and federal level.<sup>178</sup> Law enforcement and intelligence agencies also already had powers to collect intelligence<sup>179</sup> and Australia had implemented a number of international instruments concerning different types of terrorist activity.<sup>180</sup> Despite this, as Australia witnessed the horror of the 9/11 terrorist attacks on the United States, it became apparent that this legal landscape may not be sufficient to deal with the emerging threat of international terrorism.<sup>181</sup>

Following 9/11, the United Nations (UN) Security Council unanimously adopted Resolution 1373 and called for 'improved international cooperation to suppress and respond to acts of terrorism'.<sup>182</sup> The resolution required States to ensure that 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly

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<sup>175</sup> Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia: 2001–2005' (2007) 10(1) *Flinders Journal of Law Reform* 81; Williams, 'A Decade of Australian Anti-Terror Laws', above n 171.

<sup>176</sup> The impressive scope of these pre-existing laws was noted by Australia in its first report to the UN Counter-Terrorism Committee on the implementation of Security Council Resolution 1373. Australian Government, *Report of Australia to the Counter-Terrorism Committee of the United Nations Security Council pursuant to paragraph 6 of Security Council Resolution 1373* (28 September 2001). See also Nathan Hancock, *Bills Digest: Security Legislation Amendment (Terrorism) Bill 2002 [No 2]*, No 126 of 2001–02, 30 April 2002, 3.

<sup>177</sup> *Crimes Act 1914* (Cth) s 30A.

<sup>178</sup> For a comprehensive discussion of pre-2002 measures see Department of the Parliamentary Library, 'Terrorism and the Law in Australia: Legislation, Commentary and Constraints' (Research Paper No 12, Department of the Parliamentary Library, Parliament of Australia, 2002).

<sup>179</sup> For example some of these agencies had the power to engage in telecommunications interception: *Telecommunications (Interception) Act 1979* (Cth); use listening and tracking devices; gain access to computers: *Australian Security and Intelligence Organisation Act 1979* (Cth); and engage in undercover operations: *Crimes Act 1914* (Cth). A National Crime Authority also existed with power to investigate and combat serious and organised crime on a national basis and to analyse and disseminate relevant criminal information and intelligence to law enforcement agencies: *National Crime Authority Act 1984* (Cth).

<sup>180</sup> For example, the *Crimes (Hostages) Act 1989* (Cth) implemented the *International Convention Against the Taking of Hostages*, and the *Crimes (Internationally Protected Person) Act 1976* (Cth) implemented the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*. For further discussion see Reilly, above n 175.

<sup>181</sup> Williams, 'A Decade of Australian Anti-Terror Laws', above n 171, 1131.

<sup>182</sup> SC Res 1373, UN SCOR, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).

reflects the seriousness of such terrorist acts'.<sup>183</sup> At the same time, a UN High Commissioner on Human Rights also emphasised that States should exercise caution when enacting new laws to avoid breaching their international human rights, refugee and humanitarian law obligations.<sup>184</sup> The Howard Government moved quickly to respond to these new international standards,<sup>185</sup> but it took some months before new legislative measures could be introduced, due to the proroguing of Parliament in early October 2001.<sup>186</sup>

In December 2001 the re-elected Howard Government announced a series of measures to strengthen Australia's counter-terrorism capabilities, which were introduced into Parliament during 2002.<sup>187</sup> The most substantive of these became the Security Legislation Amendment (Terrorism) Bill 2002 (Cth) (SLAT Bills, CSA 1) and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) (ASIO Bill 2002, CSA 2). These laws introduced the term 'terrorist act' into the *Criminal Code Act 1995* (Cth) and created a range of related criminal offences, as well as new law enforcement and intelligence-gathering powers for government agencies, including ASIO. The Bills also set out a process

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<sup>183</sup> Ibid Art 2(e).

<sup>184</sup> See, eg, UN Commission on Human Rights, *Message by 17 independent experts of the Commission on Human Rights on the occasion of Human Rights Day*, S/RES/1805(2008), UN Doc E/CN.4/2002/137 (20 March 2008).

<sup>185</sup> For example, the Howard Government established a high-level, multi-agency committee to review the implications for Australia's security and counter-terrorism arrangements. The government also made regulations pursuant to the relevant UN resolutions targeting the financing of terrorism: see, eg, *Banking (Foreign Exchange) Regulations*; *UN Charter (Anti-terrorism Measures) Regulation 2001* (Cth). Phil Larkin and John Uhr, 'Bipartisanship and Bicameralism in Australia's "War on Terror": Forcing Limits on the Extension of Executive Power' 15(2–3) *Journal of Legislative Studies* 239, 241.

<sup>186</sup> Prime Minister Howard called the 2001 federal election on 5 October 2001 and the ballot was held on 10 November 2001. The outcome was a 2 per cent two-party-preferred swing to the Howard Government and an increase in its parliamentary majority. See Stephen Barber and Sue Johnson, 'Federal election results 1901–2014' (Parliamentary Research Papers 2014-15, Parliamentary Library, Parliament of Australia, 2014) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/FedElect](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/FedElect)>.

<sup>187</sup> These laws included: *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Border Security Legislation Amendment Act 2002* (Cth); *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth); *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth); *Crimes Amendment Act 2002* (Cth); *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth); *Telecommunications Interception Legislation Amendment Act 2002* (Cth); and *Criminal Code Amendment (Terrorism) Act 2003* (Cth). In addition to this package of Bills, a range of other legislative measures were introduced in the first half of 2002 that contributed to the Howard Government's counter-terrorism policy framework and that were subject to scrutiny by parliamentary committees. These include the Proceeds of Crime Bill 2002 (Cth), the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 (Cth), and the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 (Cth).

for proscribing an organisation as a ‘terrorist organisation’ and created a range of ‘terrorist organisation’ offences.<sup>188</sup>

A number of observers described this package of legislation as being ‘rushed through Parliament, with disregard [for] the parliamentary process’.<sup>189</sup> All of the Bills introduced on 12 March 2002<sup>190</sup> were passed by the House of Representatives in a single day, prompting Simon Crean, then Leader of the Opposition, to observe that the government ‘have taken six months to consider this legislation and they have given us 16 hours to consider their consideration’.<sup>191</sup> In the Senate, where the Howard Government did not have a majority, the package of Bills were successfully referred to the LCA Legislation Committee for inquiry and report.<sup>192</sup> As discussed in Part II, despite its short time frame, this inquiry attracted over 431 submissions and resulted in a number of rights-enhancing amendments to the Bills.<sup>193</sup>

Importantly, this inquiry also saw the ASIO Bill 2002 – which proposed to introduce a new questioning and detention regime for ASIO – separated from the package of Bills. The ASIO Bill 2002 was then referred for separate inquiry by both the PJC on ASIO, ASIS and DSD and the LCA References Committee.<sup>194</sup> The PJC on ASIO, ASIS and DSD described the ASIO Bill

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<sup>188</sup> For further commentary on these Acts see Larkin and Uhr, above n 185, 241. See also Jenny Hocking, *Terror laws: ASIO, counter-terrorism and the threat to democracy* (University of New South Wales Press, 2004) 327; Jenny Hocking ‘Protecting Democracy by Preserving Justice: Even for the Feared and the Hated’ (2004) 27 *University of New South Wales Law Journal* 319.

<sup>189</sup> Hocking, *Terror Laws*, above n 188, 327; see also Williams, ‘A Decade of Australian Anti-Terror Laws’, above n 171; Michael Head, ‘“Counter-terrorism” Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights’ (2002) 26(3) *Melbourne University Law Review* 666; Jude McCulloch, ‘War at Home: National Security Arrangements Post 11 September 2001’ (2002) 27(2) *Alternative Law Journal* 87.

<sup>190</sup> The package of legislation introduced was: Security Legislation Amendment (Terrorism) Bill (No 2) 2002 (Cth), Border Security Legislation Amendment Bill 2002 (Cth) and the Telecommunications Interception Legislation Amendment Bill 2002 (Cth).

<sup>191</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1143 (Simon Crean, Leader of the Opposition). See also Reilly, above n 175, 92.

<sup>192</sup> LCA References Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002).

<sup>193</sup> See discussion in Chapter 5, Section C (Phase 1). For further discussion see Sudip Sen, *Bills Digest Criminal Code Amendment (Terrorist Organisations) Bill 2002*, No 87 of 2002–03, 21 January 2002.

<sup>194</sup> The House of Representatives referred the ASIO Bill to the PJC on ASIO, ASIS and DSD on 21 March 2002 for an advisory report. On the same day, the Senate referred the provisions of the Bill to the LCA Legislation Committee. On 21 October 2002, the Senate referred the ASIO Bill 2002 and related matters to the LCA References Committee for inquiry and report by 3 December 2002. LCA References Committee, Parliament of Australia, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002).

2002 as ‘one of the most controversial pieces of legislation considered by the Parliament in recent times’ and one which ‘would undermine key legal rights and erode the civil liberties that make Australia a leading democracy’.<sup>195</sup> Having been reintroduced in amended form as a result of this multi-committee scrutiny process,<sup>196</sup> the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003 (Cth) (ASIO Bill 2003, CSA 3) finally passed both Houses in mid-2003.

While this package of legislation was making its way through Parliament, on 12 October 2002 a terrorist bombing incident occurred in a nightclub on the Indonesian island of Bali, killing 202 people and injuring 209. Among the dead were 88 Australians, leading some to describe this incident as ‘Australia’s September 11’.<sup>197</sup> This incident triggered the rapid enactment of the Criminal Code Amendment (Offences Against Australians) Bill 2002 (Cth), which made it an offence to harm or kill Australians overseas. The Criminal Code Amendment (Terrorism) Bill 2003 (Cth) was also introduced to ensure a sound constitutional basis for the new terrorism provisions in the *Criminal Code Act 1995* (Cth).<sup>198</sup>

The protection of national security information had also emerged as a priority issue for the Howard Government following the successful prosecutions of Australian intelligence officers in Australia and the US for attempting to sell classified national security information.<sup>199</sup> On 2 April 2003, the Attorney-General referred the issue of the protection of classified security information to the ALRC for inquiry and report, which, as discussed below, would later become

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<sup>195</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002). See also Jenny Hocking, ‘Protecting Democracy by Preserving Justice’, above n 1888, 322.

<sup>196</sup> This process is discussed in detail in Chapter 5.

<sup>197</sup> See, eg, Colin McDonald, ‘The Bali Bombing’ (2002/2003) *Summer Bar News: Journal of the New South Wales Bar Association* 3; Fred Brenchley, ‘I Won’t Forget This Week ... For As Long As I Live’ *The Bulletin* (Sydney), 29 October 2002, 22.

<sup>198</sup> See Explanatory Memorandum, Criminal Code Amendment (Terrorism) Bill 2003 (Cth). The Bill would re-enact Part 5.3 of the Criminal Code (which contains federal terrorism offences enacted in June 2002, and amended in October 2002) so that it would attract the support of State references of power in accordance with s 51(xxxvii) of the *Constitution*. The substance of the offences would not be affected. This was accompanied by the *Criminal Code Amendment (Terrorist Organisations) Act 2002* (Cth), which was designed to enable the government to proscribe Jemaah Islamiah immediately after the Bali attack. This was followed by the Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Cth); Criminal Code Amendment (Hizballah) Bill 2003 (Cth), Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Bill 2003 (Cth), which were designed to overcome the need for a UN Security Council resolution as a prerequisite to proscription of organisations as terrorist organisations under Australian law.

<sup>199</sup> ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004).

relevant to the review and scrutiny of another case study Bill (CSA 5).<sup>200</sup> The year 2003 also saw the introduction of new laws to further broaden ASIO's intelligence-gathering and questioning powers.<sup>201</sup>

## 2 *The Second Tranche: Pre-charge Detention and Protection of Security Information (2004–2005)*

The second tranche of counter-terrorism legislation saw the Howard Government rapidly expand the powers of law enforcement and intelligence agencies to detain and question people when investigating terrorist-related activity, and the beginnings of a notable 'push back' from sections of the public, who called for greater oversight of these agencies.

The second tranche occurred in the aftermath of the Madrid train bombings in March 2003, which killed 191 people and injured almost 2000.<sup>202</sup> Legislation was introduced to address a range of procedural matters connected to terrorism offences, including the Anti-Terrorism Bill 2004 (Cth) (CSA 4), which amended the *Crimes Act 1914* (Cth) to make special provisions in relation to bail and non-parole periods, investigative periods (which later became known as the Part IC 'dead time' provisions) and periods of arrest for terrorism offences. The Bill also introduced a strict liability component to the offence of training with a terrorist organisation and a new offence of associating with a terrorist organisation.<sup>203</sup>

The Anti-Terrorism Bill 2004 also amended the *Proceeds of Crime Act 2002* (Cth) to provide for the recovery of literary proceeds derived from offences committed outside Australia and subsequently transferred to Australia.<sup>204</sup>

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<sup>200</sup> Ibid.

<sup>201</sup> *ASIO Legislation Amendment Act 2003* (Cth). This legislation extended the maximum period of time a person using an interpreter could be held for questioning to 48 hours (instead of 24 hours), required the subject of an ASIO warrant to surrender their passport, and created new offences relating to disclosure of information about ASIO warrants or operational information. See Greg Carne, 'Brigitte and the French Connection: Security Carte Blanche or A La Carte?' (2004) 9(2) *Deakin Law Review* 573.

<sup>202</sup> See Fernando Reinares, 'After the Madrid Bombings: Internal Security Reforms and Prevention of Global Terrorism in Spain' (2009) 32(5) *Studies in Conflict and Terrorism* 367.

<sup>203</sup> These new offences are now contained in s 102.8 of the *Criminal Code Act 1995* (Cth).

<sup>204</sup> ASIO's powers were also further extended as a result of the enactment of the *Anti-Terrorism Act (No 3) 2004* (Cth) which made sure that those subject to a request by the Director-General of ASIO for a questioning warrant were prevented from leaving Australia. See also Nicola Roxon, 'Hicks, Habib and Government Neglect' (2004) 181 *Lawyers Weekly* 10; see also Sharon Pickering, Amanda Third and Dean Wilson, 'Media, Secrecy and Guantanamo Bay' (2004) 16(1) *Current Issues in Criminal Justice* 79.



While these laws made their way through Parliament, there was a renewed push to ensure that the rapidly expanding powers of ASIO and other intelligence agencies were subject to robust parliamentary oversight. For example, in 2003 the PJC into ASIO, ASIS and DSD recommended an independent inquiry into Australia's intelligence agencies, which resulted in the establishment of the Flood Inquiry in 2004.<sup>205</sup> The Flood Inquiry in turn recommended that the committee's mandate be extended to cover all intelligence agencies and that the committee be renamed the PJCIS.<sup>206</sup> This pattern of extension of executive power, followed by recommendations for increased oversight of executive agencies, has characterised Australia's counter-terrorism law-making experience, and is discussed further in Part II and III.

During 2004, the Howard Government introduced a range of other counter-terrorism laws designed to expand the powers of ASIO and the AFP, including increased telecommunications interception<sup>207</sup> and surveillance powers.<sup>208</sup> The National Security Information (Security Proceedings) Bill 2004 (Cth) (CSA 5) was also introduced to prevent or limit disclosure of national security information in criminal proceedings,<sup>209</sup> without waiting for the detailed recommendations of the ALRC, which was at that time preparing a report on the handling of national security information.<sup>210</sup>

Despite the haste at which legislation was introduced in this second tranche of counter-terrorism law making, these Bills were subject to detailed parliamentary committee inquiries where recommendations were made to narrow the scope of the proposed new powers, introduce new safeguards to limit the laws' impact on individual rights, and improve parliamentary oversight.<sup>211</sup> The changes recommended by the parliamentary committees received strong

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<sup>205</sup> Flood, above n 95.

<sup>206</sup> Ibid 180, Recommendation 1.

<sup>207</sup> See, eg, Telecommunications (Interception) Amendment (Stored Communications) Bill 2004 (Cth).

<sup>208</sup> See, eg, Surveillance Devices Bill 2004 (Cth).

<sup>209</sup> See, eg, National Security Information (Criminal Proceedings) Bill 2004 (Cth).

<sup>210</sup> As discussed further in Chapter 5, the provisions of the Bill departed from the findings of the ALRC in important respects. This is discussed further in Chapter 5, Section C(1) and (2).

<sup>211</sup> See discussion in Chapter 5 C(2). See also Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), 'General Outline'; Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (19 August 2004). For a summary of the rights-enhancing changes made to the case study Acts see Appendix D.

support from a range of Senators, some of whom demanded further reforms to these laws or completely opposed their passage.

With a full legislative list before the Senate, the Howard Government called a federal election for 9 October 2004 and returned to office with a clear Senate majority for the first time since 1980. The new government moved quickly to reintroduce and pass a number of the counter-terrorism Bills that had previously stalled before the Senate. As discussed further in Part II, many of these Bills were reintroduced in amended form, taking up a significant number of the recommendations made by parliamentary committees prior to the election.<sup>212</sup>

### 3 *The Third Tranche: Control Orders and Preventative Detention Orders (2005)*

The third tranche of counter-terrorism law making further expanded the powers of law enforcement agencies, this time to control or restrict the movement, communications and associations of people suspected of involvement in or knowledge of terrorist-related activity. It signalled a substantive departure from established criminal law principles, and ultimately attracted the attention of the High Court. This third tranche also generated strong public interest, including in the form of high levels of participation in parliamentary committee inquiries into these laws.

This third tranche of counter-terrorism law making occurred in the wake of a number of terrorist attacks that took the lives of Australians.<sup>213</sup> These incidents gave the Howard Government the political ‘green light’ to introduce new regimes to control the movements, associations and communications of those thought to be involved in or have information about

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<sup>212</sup> For example, the Telecommunications (Interception) Amendment (Stored Communications) Bill 2004 (Cth) was reintroduced on 17 November 2004 and passed on 8 December 2004. The Bill had previously been subject to an inquiry by the LCA Legislation Committee in May 2004. The National Security Information (Criminal Proceedings) Bill 2004 (Cth), and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth) were referred to the LCA Legislation Committee for inquiry and report by 19 August 2004. LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 (Cth) and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004 (Cth)* (2004). Following the election, the Bills were reintroduced and quickly passed.

<sup>213</sup> In particular, on 1 October 2005 a series of terrorist suicide bombs and car bombs occurred in Bali, Indonesia. Four Australians were killed and 19 injured. See, eg, Simon Benson, ‘Tony Abbott Tells of 2005 Bali Bomb Terror’, *news.com.au* (online), 9 October 2013 <<http://www.news.com.au/national/tony-abbott-tells-of-2005-bali-bomb-terror/story-fncynjr2-1226735443437>>; See also Christopher Michaelson, ‘Antiterrorism Legislation in Australia: A Proportionate Response to the Terrorist Threat?’ (2005) 28(4) *Studies in Conflict & Terrorism* 321.

terrorist-related activity (control order and preventative detention order regimes), as well as amending existing sedition laws with a view to capturing a much wider range of terrorist-related forms of expression.<sup>214</sup> Enacting these new laws depended upon the referral of powers by the states and territories to the Commonwealth, and involved multiple levels of negotiation, starting with COAG.<sup>215</sup> The Howard Government sought to pursue these negotiations without publicly revealing the content of the proposed law. However, on 14 October 2005, the ACT Chief Minister, Jon Stanhope, released a version of the Bill on his website.<sup>216</sup> Stanhope later explained that he pursued this course of action to provide an opportunity for rigorous public scrutiny of the laws: '[T]hey were proposing some quite draconian legislation without taking the people of Australia into their confidence. That's all I was seeking to do. And I did ... want some of the brains around the place to get to look at it.'<sup>217</sup> Stanhope also considered it his role, as Chief Minister of a jurisdiction with a recently enacted *Human Rights Act*, to seek advice about the rights compatibility of the proposed law.<sup>218</sup>

This led to the public release of the Anti-Terrorism Bill (No 2) 2005 (Cth) (Control Orders Bill, CSA 6), which was subject to intense parliamentary debate and scrutiny, led by two specific groups of parliamentarians: the Attorney-General's Backbenchers Committee<sup>219</sup> and the LCA Legislation Committee.<sup>220</sup> As Part II documents, the 'prominence and persistence of these parliamentarians' resulted in important rights-enhancing changes to the proposed laws, particularly those 'elements of the legislation most offensive to traditional common law and

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<sup>214</sup> As noted in Chapter 5, Section C(2), these reforms were introduced as part of the Anti-Terrorism Bill (No 2) 2005 (Cth).

<sup>215</sup> Council of Australian Governments, *Communiqué – Council of Australian Governments* (27 September 2005), Special Meeting on Terrorism.

<sup>216</sup> Jon Stanhope, 'Chief Minister Makes Public Draft Terror Legislation' (Media Release, 14 October 2005) <[http://www.cmd.act.gov.au/open\\_government/inform/act\\_government\\_media\\_releases](http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases)>.

<sup>217</sup> Interview with Jon Stanhope, former Chief Minister of the Australian Capital Territory (Canberra, 27 September 2016).

<sup>218</sup> Ibid.

<sup>219</sup> Greg Carne, 'Prevent, Detain, Control and Order? Legislative Process and Executive Outcomes in Enacting the Anti-Terrorism Act (No 2) 2005 (Cth)' (2007) 10(1) *Flinders Journal of Law Reform* 17, 43. See also Michelle Grattan, 'A hard slog for backbench rebels as Howard gets his way on key legislation', *The Age* (Melbourne), 2 December 2005; See also the transcript of an interview with George Brandis, ABC, 'Friday Forum', *Lateline*, 21 October 2005 (Senator George Brandis, Chair of Backbench Committee) <<http://www.abc.net.au/lateline/content/2005/s1488112.htm>>; Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005 (George Brandis, Senator).

<sup>220</sup> Carne, above n 219, 43.

due process rights'.<sup>221</sup> These changes, which could be described as an example of the 'hidden impact' considered in Chapter 7, occurred despite the short time frame given to the LCA Legislation Committee to conduct its inquiry.<sup>222</sup> As the then Chair of the LCA Legislation Committee, Senator Marise Payne, observed:

What I see played out is an intensive Senate inquiry – I acknowledge absolutely that it happened over a relatively short period of time – and very intense days of hearing, but an inquiry which still attracted almost 300 submissions and which nevertheless resulted in the comprehensive ventilation of a range of concerns of both individuals and organisations in the community in relation to the legislation.<sup>223</sup>

As explored in Part III, the scrutiny of this Bill exemplifies both the strengths and weaknesses of Australia's parliamentary model of rights protection. On the one hand, significant rights-enhancing changes were made to the Control Orders Bill that are directly attributable to the work of parliamentary committees and their key participants, despite the short time frames and the government-controlled Senate.<sup>224</sup> On the other hand, the enacted law still contained a range of rights-abrogating features, some of which have since been declared contrary to international human rights standards and repealed in other comparable jurisdictions such as the UK.<sup>225</sup> These strengths and weaknesses of the rights-protecting role of parliamentary committees are considered further in Part III.

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<sup>221</sup> Ibid. As discussed in Chapter 5, Section C(2), a large number of amendments moved by the government were made in response to the recommendations of the LCA Legislation Committee and reflect consideration of 'legal process rights' – such as service of notification that a control order has been sought and the requirement to specify grounds in an application for a control order or preventative detention order. Note that Carne is highly critical of the government's failure to adopt the full range of the LCA Committee's recommendations with respect to the Bill: see discussion at Carne, above n 219, 48.

<sup>222</sup> Ibid 45–8. As discussed in Chapter 6, Section B, the short period in which this inquiry was conducted has attracted much criticism and been the subject of broader academic analysis relating to the process of enacting counter-terrorism laws in Australia.

<sup>223</sup> See Commonwealth, *Parliamentary Debates*, Senate, 28 November 2005 (Marise Payne).

<sup>224</sup> See above n 221. See also LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005). See also Appendix D.

<sup>225</sup> See discussion in Chapter 5. See also Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 Bill and LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (28 November 2005). See also Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tullich, T, Anaian-Welsh R, Bronitt S and Murray S (eds) *Regulating Preventative Justice: Principle, Policy and Paradox* (Routledge, 2017) 136; Daniel Reynolds and George Williams, *A Charter of Rights for Australia* (NewSouth Books, 4th ed 2017).

#### 4 *Time for Review: Parliamentary and Judicial Review of Counter-Terrorism Laws (2005–2008)*

By 2006, some of the Howard Government's counter-terrorism laws had been utilised by intelligence and law enforcement agencies, occasionally giving rise to criminal charges and complaints of misuse or overuse.<sup>226</sup> In other comparable jurisdictions, such as the UK, efforts were being made to strengthen oversight of the use of counter-terrorism laws<sup>227</sup> and international human rights bodies began to question whether Australian counter-terrorist laws were compliant with our international human rights obligations.<sup>228</sup>

These factors, combined with the expiry of sunset clauses included in a number of the counter-terrorism Acts described above,<sup>229</sup> gave rise to a period of sustained independent review of Australia's counter-terrorism regime, from both within and outside of Parliament. These reviews included the:

- 2006 ALRC Report No 104 *Fighting Words: A Review of Sedition Laws in Australia*;<sup>230</sup>
- 2006 PJCIS's Review of Security and Counter Terrorism Legislation;<sup>231</sup>

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<sup>226</sup> See, eg, George Williams, Fergal Davis and Nicola McGarrity (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014); George Williams, 'Executive Oversight of Intelligence Agencies in Australia' in Z K Goldman and S J Rascoff (eds), *Global Intelligence Oversight: Governing Security in the Twenty-First Century* (Oxford University Press, 2006); George Williams, 'Anti-terror Legislation in Australia and New Zealand' in V Ramraj, M Hor, K Roach and G Williams (eds), *Global Anti-Terrorism Law And Policy* (Cambridge University Press, 2<sup>nd</sup> ed, 2012) 541; Spencer Zifcak, 'Counter-terrorism and Human Rights' in John Menadue and Michael Keating (eds), *Fairness, opportunity and security* (ATF Press, 2015) 249; Rosemary Foot, 'The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29(2) *Human Rights Quarterly* 489; Tyulkina and Williams, above n 225; Reynolds and Williams, *A Charter of Rights for Australia*, above n 225.

<sup>227</sup> For example, in the UK, the Independent Reviewer of Terrorism Laws was given specific statutory oversight functions for the use of control orders in the *Prevention of Terrorism Act 2005* (UK). See also Mark Elliott, 'United Kingdom: Detention Without Trial and the War on Terror' (2006) 4 *International Journal of Constitutional Law* 553; Andrew Lynch, 'Control Orders in Australia: a Further Case Study in the Migration of British Counter-terrorism Law' (2008) 8(2) *Oxford University Commonwealth Law Journal* 159.

<sup>228</sup> For example in 2009 the UN Human Rights Committee concluded that Australia should 'ensure that its counter-terrorism legislation and practices are in full conformity with the [ICCPR]'. UN Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding observations of the Human Rights Committee: Australia*, 95<sup>th</sup> sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [11].

<sup>229</sup> See, eg, Nicola McGarrity, Rishi Gulati and George Williams, 'Sunset Clauses in Australian Anti-Terror Laws' (2012) 33 *Adelaide Law Review* 307.

<sup>230</sup> ALRC, *Fighting Words*, above n 170.

<sup>231</sup> PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006).

- 2006 report of the Security Legislation Review Committee (the Sheller Committee) into the operation, effectiveness and implications of the package of anti-terrorism legislation introduced during 2002 and 2003;<sup>232</sup>
- 2007 PJCIS inquiry into the proscription of ‘terrorist organisations’ under the Criminal Code;<sup>233</sup> and
- the 2008 inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (the Haneef Inquiry);<sup>234</sup>

Taken together, these inquiries represent an important assessment of the key components of Australia’s counter-terrorism laws enacted up until 2008. They attracted significant numbers of submissions and generated mainstream media coverage.<sup>235</sup> As discussed in Part II, the past work of parliamentary committees featured prominently in these reviews, and contributed to important legislative change in the form of the *National Security Legislation Amendment Act 2010* (Cth) (CSA 7) and the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Bill, CSA 8). As discussed below, these two case study Acts contain a range of features that directly reflect some of the recommendations made during these reviews.

At the same time, the courts had also begun to consider the application of some of the new counter-terrorism offences and procedural provisions, and had been called upon to adjudicate questions of their constitutionality.<sup>236</sup> For example, in *R v Lodhi*,<sup>237</sup> the defendant sought to challenge the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) on the ground that it permitted a person accused of committing terrorist offences to be

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<sup>232</sup> Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006). The package of laws reviewed were: *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth); *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth); *Border Security Legislation Amendment Act 2002* (Cth); *Telecommunications Interception Legislation Amendment Act 2002* (Cth) and the *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

<sup>233</sup> PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007) 117.

<sup>234</sup> Clarke, above n 170.

<sup>235</sup> This is discussed further in Chapter 6, Section D.

<sup>236</sup> George Williams, Fergal Davis and Nicola McGarrity (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014).

<sup>237</sup> *R v Lodhi* [2006] NSWSC 571; see also *Lodhi v The Queen* (2007) 179 A Crim R 470, 487 [67].

sentenced through a process incompatible with the exercise of federal judicial power.<sup>238</sup> The Act was found to be not inconsistent with the exercise of judicial power, on the basis that it was concerned with pre-trial disclosure of evidence rather than setting out a process for excluding evidence during the trial itself.<sup>239</sup>

Shortly after, in *Thomas v Mowbray*,<sup>240</sup> the High Court considered the constitutional validity of the control order regime introduced by the Control Orders Act, which was challenged on the basis that it did not fall within the Commonwealth's legislative power and breached the separation of judicial power protected by Chapter 3 of the *Constitution*. The majority of the High Court upheld the validity of the control order regime, despite strong concerns from rights advocates about its potential to allow police to deprive someone of their liberty prior to being charged with a criminal offence.<sup>241</sup> The constitutional validity of the terrorist organisation offences was also questioned and ultimately upheld in the case of *Ul-Haque v The Queen*,<sup>242</sup> where the laws were found to be validly enacted under the Commonwealth's 'external affairs' power.

The detention and visa cancellation of Dr Mohamed Haneef, an Indian doctor working in Australia,<sup>243</sup> also gave rise to questions about the use of the extensive new counter-terrorism

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<sup>238</sup> George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136.

<sup>239</sup> *Lodhi v The Queen* (2007) 179 A Crim R 470, 487 [67].

<sup>240</sup> (2007) 233 CLR 307.

<sup>241</sup> George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136; Ben Saul, 'Terrorism as Crime or War: Militarising Crime and Disrupting the Constitutional Settlement?' (2008) 19 *Public Law Review* 20; Geoffrey Lindell, 'The Scope of the Defence and Other Powers in the Light of *Thomas v Mowbray*' (2008) 10 *Constitutional Law and Policy Review* 42; Hernan Pintos-Lopez and George Williams, '"Enemies Foreign and Domestic": *Thomas v Mowbray* and the New Scope of the Defence Power' (2008) 27 *University of Tasmanian Law Review* 83. For a range of critiques of the High Court's decision, see Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105; Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072; Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth)' (2007) 10 *Flinders Journal of Law Reform* 17; Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209.

<sup>242</sup> [2006] NSWCCA 241.

<sup>243</sup> Dr Haneef was arrested while working in Australia on suspicion of involvement in a number of failed terrorist attacks in the UK and detained for 12 days before being charged with intentionally providing resources to a terrorist organisation. For further discussion see Sharon Pickering, and Jude McCulloch, 'The Haneef case and counter-terrorism policing in Australia' (2010) 20(1) *Policing & Society* 21.

powers provided to the AFP and intelligence agencies.<sup>244</sup> The Haneef case involved the use of the so called ‘dead time’ provisions of Part IC of the *Crimes Act*, introduced by the *Anti-Terrorism Act 2004* (Cth), which allowed Dr Haneef to be detained by police for a prolonged period without charge.<sup>245</sup> Dr Haneef was eventually charged with the offence of ‘providing support to a terrorist organisation’ and granted bail, but the Minister for Immigration then decided to cancel his visa on character grounds.<sup>246</sup> An inquiry conducted by Michael John Clarke made a number of findings that were critical of the handling of the case by key government agencies and recommended that the federal government:

- amend the ‘dead time’ provisions in Part IC of the *Crimes Act*;
- appoint an independent reviewer of terrorism laws; and
- amend the Criminal Code offence of providing support to a terrorist organisation.<sup>247</sup>

As discussed further in Part II, these recommendations, combined with previous recommendations made by parliamentary committees, led to important changes in Australia’s counter-terrorism legislative framework and cemented the already popular view that rigorous independent oversight was necessary if executive agencies were to be invested with extraordinary and intrusive investigative powers.

## 5 *The Fourth Tranche: Updating Australia’s Counter-Terrorism Framework (2008–2010)*

The 2007 election resulted in a change of government for the first time in 11 years.<sup>248</sup> While national security remained a high-ranking issue among voters, the ALP’s campaign included a focus on ‘getting the balance right’ between security and liberty when it came to counter-

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<sup>244</sup> See, eg, Law Council of Australia, *Anti-Terrorism Reform Project* (October 2013) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Dec2012Update-Anti-TerrorismReformProject.pdf>>.

<sup>245</sup> *Ibid.*

<sup>246</sup> The charge was later dropped and his visa cancellation quashed. Dr Haneef later received monetary compensation from the Australian government. See Clarke, *Haneef Report*, above n 170, 2–3.

<sup>247</sup> Other recommendations were directed towards improving cooperation and information sharing between key government agencies. Clarke, *Haneef Report*, above n 170, Summary of Recommendations. See also Michael Head, ‘What the Haneef Inquiry Revealed (and Did Not)’ (2009) 34(4) *Alternative Law Journal* 243.

<sup>248</sup> The election was held on 24 November 2007. Under the leadership of Kevin Rudd, the ALP was returned to office with 83 seats. The Coalition lost control of the Senate, but still held 37 seats – five more than the government. The balance of power in the Senate was shared between Nick Xenophon, Steve Fielding and the five Greens. See Barber and Johnson, above n 186.



terrorism laws.<sup>249</sup> This coincided with a renewed push by rights advocates for a federal charter or bill of rights for Australia, spurred on by the National Consultation process.<sup>250</sup>

In this climate, work was underway to respond to the findings of previous inquiries into Australia's counter-terrorism laws. On 12 August 2009, the then Attorney-General, the Hon Robert McClelland, released a lengthy discussion paper outlining proposed reform options to Australia's counter-terrorism laws, some of which sought to narrow the scope of key provisions and improve safeguards and oversight mechanisms.<sup>251</sup> The PJCIS was asked to conduct an inquiry into the reforms set out in the discussion paper and produced a report that drew heavily from the findings and submissions made to the previous inquiries set out above.<sup>252</sup>

In response to the PJCIS report, the government introduced the National Security Legislation Amendment Bill 2010 (Cth) (CSA 8) which contained some, but not all, of the reforms proposed by the discussion paper.<sup>253</sup> Around this time, and also in response to earlier reviews of counter-terrorism laws, the government introduced legislation to establish the position of the Independent National Security Legislation Monitor (*INSLM Act 2010* (Cth), CSA 7) to review and report on the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation on an ongoing basis.<sup>254</sup> This Act was passed

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<sup>249</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2008 (Kevin Rudd, Prime Minister). Note that the Rudd Government continued to expand the investigative and intelligence-collection powers of law enforcement and intelligence agencies: see, eg, *Telecommunications (Interception and Access) Amendment Act 2008* (Cth); *Telecommunications Interception Legislation Amendment Act 2008* (Cth).

<sup>250</sup> See, eg, Robert McClelland, 'Australia and International Human Rights: Coming in from the Cold' (Speech delivered at the Human Rights and Equal Opportunity Commission Law Seminar, Sydney, 23 May 2008) <<https://www.humanrights.gov.au/news/speeches/law-seminar-2008-australia-and-international-human-right-coming-cold-hon-robert>>.

<sup>251</sup> See Robert McClelland, Attorney-General, 'National Security Legislation Discussion Paper' (Media Release, 12 August 2009). See also LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) [1.2].

<sup>252</sup> This PJCIS inquiry is discussed further in Chapter 5, Section C(2). See also LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

<sup>253</sup> See National Security Legislation Amendment Bill 2010 (Cth). For example, the Bill pursued the amendments proposed in the discussion paper that related to the treason offences in the Criminal Code; the urging violence offences (previously known as the sedition offences) in the Criminal Code; the 'dead-time provisions' in the *Crimes Act*; the bail provisions in the *Crimes Act*; the introduction into the *Crimes Act* of a new emergency warrantless entry and search power; and *National Security Information (Criminal Proceedings) Act 2004* (Cth).

<sup>254</sup> The Monitor is also responsible for considering if counter-terrorism and national security laws remain necessary and are proportionate to any threat of terrorism or to national security. The Act responded to recommendations made by Clarke, *Haneef Report*, above n 170; PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007) 52; PJCIS, Parliament of

in advance of the 2010 federal election, but the position of INSLM was not filled until April 2011.<sup>255</sup> This paved the way for further independent reviews of Australia's counter-terrorism laws to take place, with a specific focus on rights compatibility.<sup>256</sup> COAG also revisited Australia's counter-terrorism framework in 2012, reflecting on the changes implemented in 2005 by the states and territories relating to the control order and preventative detention order regimes, along with a range of other matters.<sup>257</sup>

This period of gradual and selective implementation of the findings of past reviews of Australia's counter-terrorism laws demonstrates both the significance and limits of the rights protection role of the parliamentary committee system. On the one hand, the impact of the committee system on the content of counter-terrorism laws during this period was direct and generally rights-enhancing, particularly when it came to improving safeguards and enhancing independent oversight of the use of executive powers.<sup>258</sup> However, it is also clear that the ALP government's response left many rights-abrogating features of the legislative framework in place, and further entrenched some of these features (such as the control order regime) into Australia's legal landscape. As Part II documents, while new rights-review bodies may have been established, the politics of 'tough on terror' continued to be persuasive, particularly as the

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Australia, *Review of Security and Counter Terrorism Legislation* (2006) 21–2; Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6 (Sheller Committee Report).

<sup>255</sup> Wayne Swan, Acting Prime Minister and Treasurer, 'Appointment of the Independent Monitor of National Security Legislation' (Media Release, 21 April 2011). Mr Swan announced that Mr Bret Walker SC had been appointed to the Monitor position.

<sup>256</sup> For example, on 19 March 2012, the first annual report of the Monitor was tabled in Parliament. The Monitor's first report identified issues relating to Australia's international obligations to comply with global efforts to combat terrorism and to protect human rights; compulsory questioning and detention powers of ASIO; Criminal Code provisions relating to terrorist offences, control orders and preventative detention orders; and the utility of the *National Security Information (Criminal Proceedings) Act 2004* (Cth) in the conduct of terrorism trials. Bret Walker, *Independent National Security Legislation Monitor, Annual Report* (2011) <<http://www.dpmc.gov.au/publications/INSLM/index.cfm>>

<sup>257</sup> The COAG Review of Counter-Terrorism Legislation was announced by the Prime Minister on 9 August 2012. A specialist committee chaired by the Honourable Anthony Whealy QC was appointed to undertake the review which encompassed a range of Commonwealth counter-terrorism provisions, and corresponding state and territory laws. COAG, *Final Report of the COAG Review of Counter-Terrorism Legislation* (2013) <<https://www.ag.gov.au/Consultations/Pages/COAGReviewofCounter-TerrorismLegislation.aspx>>.

<sup>258</sup> Discussed further in Chapter 6. For examples of rights-enhancing changes see Appendix D.

ALP entered its second term in government and confronted its second leadership change in three years.<sup>259</sup>

## 6 *The Fifth Tranche: Dealing with 'Home-Grown' Terrorism (2013–2015)*

The election of the Abbott Coalition Government in 2013 brought with it a new tranche of counter-terrorism law making, squarely focused on confronting the national security challenges presented by Australian citizens who were engaged in terrorist activity overseas.<sup>260</sup> According to incoming Attorney-General Brandis, Australia had become one of the largest per-capita sources of foreign fighters in the Syrian conflict from countries outside the region.<sup>261</sup> This led to significant concerns that foreign fighters returning to Australia posed a real threat to national security,<sup>262</sup> underscored by terrorist attacks undertaken by so-called 'home-grown' terrorists in the UK and France.<sup>263</sup> There was also a push at the international level for States to act to prevent travel and support for foreign terrorist fighters.<sup>264</sup> This period also saw a decisive shift away from the previous government's policy commitment to 'human rights', with the incoming Attorney-General instead articulating his vision for the portfolio in the language of 'traditional rights and freedoms'.<sup>265</sup> As will be discussed further in Part III, this had a noticeable impact on

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<sup>259</sup> Kevin Rudd became Prime Minister for the second time when he replaced Julia Gillard on 27 June 2013 but was unable to save the ALP from defeat in the 2013 federal election on 7 September 2013, which saw the Coalition Government elected with a comfortable majority in the House. See Barber and Johnson, above n 186.

<sup>260</sup> For an overview see Cat Barker et al, *Bills Digest Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, No 34 of 2014–15, 24 September 2014.

<sup>261</sup> Anthony Bergin, 'Why Australians Shouldn't Fight in Syria', *Sydney Morning Herald* (online), 6 May 2014 <<http://www.smh.com.au/comment/why-australians-shouldnt-fight-in-syria-20140506-zr5fi.html>>.

<sup>262</sup> Cat Barker et al, *Bills Digest Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, No 34 of 2014–15, 24 September 2014.

<sup>263</sup> See, eg, Jytte Klausen, 'Tweeting the Jihad: Social Media Networks of Western Foreign Fighters in Syria and Iraq' (2015) 38(1) *Studies in Conflict and Terrorism* 1; Van Zijdewijn, Jeanine de Roy and Edwin Bakker, 'Returning Western Foreign Fighters: The Case of Afghanistan, Bosnia and Somalia' (Background Note, International Centre for Counter-Terrorism, The Hague, 2014); Limbada Zubeda and Lynn Davies, 'Addressing the Foreign Terrorist Fighter Phenomenon from a Human Rights Perspective' (2016) 18(5) *International Community Law Review* 483.

<sup>264</sup> For example, by September 2014, the UN Security Council unanimously adopted Resolution 2178 which called upon States to prevent the 'recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning of, or participation in terrorist acts'. SC Res 2178, UN SCOR, 7272<sup>nd</sup> mtg, UN Doc S/RES/2178 (24 September 2014) <[http://www.un.org/en/sc/ctc/docs/2015/SCR%202178\\_2014\\_EN.pdf](http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf)>.

<sup>265</sup> Shipra Chordia and Andrew Lynch, 'The Brandis Agenda', *Inside Story* (online), 4 December 2013 <<http://insidestory.org.au/the-brandis-agenda>>; George Brandis, 'The Freedom Wars' (Speech given at the Sydney Institute, Sydney, 7 May 2013) <<http://nofibs.com.au/freedom-wars-the-george-brandis-speech/>>. This vision gained momentum through a reference to the ALRC to inquire into all Commonwealth laws that unreasonably encroach upon traditional rights and freedoms. ALRC, *Traditional rights and Freedoms report*,

the way key participants framed and articulated their concerns about individual rights during this period.

During this period, the Abbott Government introduced a range of new counter-terrorism laws that significantly expanded the pre-existing regime. These included the following case study Acts which authorised:

- the extension of the control order regime and the collection, use and sharing of intelligence information (the *Counter-Terrorism Act 2014 (No 1)*, CSA 10);<sup>266</sup>
- the collection, retention and sharing of telecommunications data (the *Data Retention Act*, CSA 9);<sup>267</sup>
- the declaration of certain overseas ‘zones’ as declared areas and the criminalisation of those who travel to those areas (the *Foreign Fighters Act*, CSA 11);<sup>268</sup> and

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above n 73. It was further supported by the appointment of former Institute of Public Affairs policy director Tim Wilson to the ALRC as the ‘Freedoms Commissioner’, George Brandis, ‘New Australian Law Reform Inquiry to Focus on Freedoms’ (Media Release, 11 December 2013) <<https://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.aspx>>.

<sup>266</sup> This Bill made changes to the *Criminal Code Act 1995* (Cth), broadening the scope of the control order regime, and to the *Intelligence Services Act 2001* (Cth). The Bill was immediately referred to the PJCIS for inquiry and report. Submissions were called for by 10 November 2014 and 17 were received. This was followed by half a day of public hearings before a report was issued on 20 November 2014. PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014).

<sup>267</sup> The Data Retention Bill 2014 was introduced in October 2014. The most controversial aspect of this long and complex Bill was the introduction of a mandatory two-year data retention regime. As discussed in Chapter 5, Section C(3), the introduction of this Bill came midway through a long-running review of the *Telecommunications (Interception and Access) Act 1979* being conducted by the LCA References Committee. See PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015). For further discussion see Chapter 5, Section C(3).

<sup>268</sup> The Foreign Fighters Bill 2014 was introduced into the Senate on 24 September 2014. This Bill proposed changes to over 20 existing Acts, introduced a range of new criminal offences, extended the scope of many other existing criminal offences, and significantly expanded the range and scope of powers available to law enforcement and intelligence-gathering agencies. The Foreign Fighters Bill was quickly referred to the PJCIS for inquiry and report. PJCIS, Commonwealth, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014). The Senate also referred the Bill to the LCA Legislation Committee for inquiry and report; however the LCA Committee declined to conduct a parallel inquiry. LCA Legislation Committee, Commonwealth, *Report on Counter-Terrorism Legislation Amendment (Foreign Fighters) Bills 2014* (2014). For further discussion see Chapter 5, Section C(3).

- the revocation of citizenship of Australians who travel overseas to engage in or support terrorist activity (the Citizenship Act, CSA 12).<sup>269</sup>

As discussed in detail in Part II, each of these laws generated substantial public and parliamentary debate. After more than ten years, the Australian community had, on the one hand, come to expect counter-terrorism law making as part of the ordinary legislative agenda of incoming Australian Governments and, on the other, become increasingly explicit in its demands for meaningful rights scrutiny of such laws. While the broad policies underpinning the laws received bipartisan support, questions about the proposed laws' infringements on the right to privacy, freedom of movement and the right to citizenship were raised by many commentators and some members of the opposition and cross bench.<sup>270</sup> In addition, questions were raised about the efficacy of these laws as preventative measures, particularly in the context of continued concern about the experience of isolation and discrimination within Australia's Islamic community, which some argued was exacerbated by the Abbott Government's 'Team Australia' rhetoric and proposed changes to the *Racial Discrimination Act 1975* (Cth).<sup>271</sup>

As discussed in detail in Chapter 5, case study Acts 9–12 were all scrutinised by the PJCIS, as well as the SSCSB and the PJCHR, during their passage through Parliament.<sup>272</sup> These PJCIS inquiries also drew upon the work of the INSLM, who became a source of influential

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<sup>269</sup> The Citizenship Bill was introduced into the Senate on 24 June 2015. The Bill sought to amend the Australian Citizenship Act 2007 to broaden the circumstances in which Australian citizenship can be revoked to include suspicion of terrorism or engagement in terrorist activity. On 25 June 2015 the Bill was referred to the PJCIS for inquiry and report. PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015). For further discussion see Chapter 5, Section C(3)

<sup>270</sup> See, eg, Tables 6.2 and 6.3 in Chapter 6.

<sup>271</sup> See, eg, Tim Leslie, 'Explained: Racial Discrimination Act Amendments' *ABC News* (online), 24 October 2016 <<http://www.abc.net.au/news/2014-04-04/racial-discrimination-act/5361330>>; Michelle Grattan, 'What Does "Team Australia" Mean, Race Discrimination Commissioner Asks', *The Conversation* (online), 20 August 2014 <<http://theconversation.com/what-does-team-australia-mean-race-discrimination-commissioner-asks-30718>>. This period also saw Attorney-General Brandis explore the idea of removing provisions in the *Racial Discrimination Act 1975* (Cth) that prohibited speech that had the effect of 'insulting or offending' a person on the grounds of race. George Brandis, Attorney-General, *Exposure Draft of the Freedom of Speech (Repeal of S.18C) Bill 2014*, Attorney-General's Department (2014) <<https://www.ag.gov.au/Consultations/Documents/Attachment%20A.pdf>>.

<sup>272</sup> As discussed further in Chapter 5, Section C(3) and Chapter 8, this period coincided with a decisive shift towards the PJCIS (as opposed to the LCA Committees) as the parliamentary scrutiny body with the membership, mandate and powers to exert political influence regarding the content of counter-terrorism legislation.

commentary on the legitimacy and effectiveness of proposed counter-terrorism laws, despite unsuccessful efforts by the Abbott Government to repeal the position.<sup>273</sup>

As Part II also demonstrates, this multi-committee scrutiny of the case study Acts proved to have a significant rights-enhancing impact, despite the rights-abrogating features of many of the enacted provisions. The PJCIS, in particular, appeared to provide a highly influential forum for the major political parties to clarify and narrow the scope of key terms, improve safeguards, and enhance oversight and reporting requirements with respect to the proposed new powers and offences in these Acts. For example, during this period, the PJCIS enjoyed a 100 per cent ‘strike rate’ in terms of having its recommendations for legislative change reflected in successful government amendments.<sup>274</sup> These changes improved the rights compliance of these Bills in important ways, for example by:

- requiring that telecommunications data be defined in primary legislation, and any data retained by authorities be de-identified or destroyed after two years;<sup>275</sup>
- ensuring that detailed public records be kept of the use of retained telecommunications data;<sup>276</sup>
- protecting the data of journalists from being accessed;<sup>277</sup>

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<sup>273</sup> In March 2014 the Abbott Government introduced the Independent National Security Legislation Monitor Repeal Bill 2014, designed to abolish the office. However, on 17 July 2014, the government decided to withdraw this Bill in the context of ongoing debate in the Senate on the adequacy of oversight mechanisms for its counter-terrorism laws. For further information see Cat Barker, *Bills Digest Independent National Security Legislation Monitor Repeal Bill 2014*, No 65 of 2013–14, 6 May 2014.

<sup>274</sup> PJCIS, Parliament of Australia, *Annual Report of Committee Activities 2014-2015* (2015) 3. The Bills examined during this period were the Counter -Terrorism Legislation Amendment (Foreign Fighters) Bill 2014; National Security Legislation Amendment Bill (No 1) 2014; Counter-Terrorism Legislation Amendment Bill (No 1) 2014; and the Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014. See also Chapter 5.

<sup>275</sup> See Revised Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), General Outline; Supplementary Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), General Outline; PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015).

<sup>276</sup> Ibid.

<sup>277</sup> Ibid.

- increasing the oversight powers and review functions of the PJCIS, including to examine the counter-terrorism activities of the Australian Federal Police;<sup>278</sup>
- narrowing the scope of the proposed ‘declared area’ offences in the Criminal Code and ensuring that such declarations are subject to disallowance by Parliament;<sup>279</sup>
- preserving the safeguards relating to specifying and reviewing the conditions imposed as part of a control order or preventive detention order;<sup>280</sup>
- narrowing the circumstances in which a dual national can have their citizenship ‘renounced’ by doing something terrorist-related overseas, including by narrowing the range of conduct that can trigger the provisions.<sup>281</sup>

It is important to note that these laws were debated and scrutinised against the backdrop of a number of reports of deeply disturbing acts of terrorism and violence.<sup>282</sup> In addition, on 12

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<sup>278</sup> See The Hon George Brandis QC, Attorney-General, ‘Government Response to the Committee’s Report on the Foreign Fighters Bill’ (Media Release, 22 October 2014); Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) xv.

<sup>279</sup> See The Hon George Brandis QC, Attorney-General, ‘Government Response to the Committee’s Report on the Foreign Fighters Bill’ (Media Release, 22 October 2014); Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendation 18.

<sup>280</sup> The Hon George Brandis QC, Attorney-General, ‘Government Response to the Committee’s Report on the Foreign Fighters Bill’ (Media Release, 22 October 2014); Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendations 5–9.

<sup>281</sup> See Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) amended clause 33AA(1); see also PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

<sup>282</sup> For example, on 11 August 2014 *The Australian* newspaper published the image of the seven-year-old son of Sydney-raised jihadist Khaled Sharrouf holding up the decapitated head of a slain Syrian soldier. According to newspaper reports, the horrifying image was posted on Twitter by a proud father with the words ‘That’s My Boy’. See, eg, Kelmeny Fraser, ‘The Photo that Will Shock the World: Jihadist Khaled Sharrouf’s Son, 7, Holds Severed Head’, *The Daily Telegraph* (Sydney, online), 4 August 2014 <<http://www.dailytelegraph.com.au/news/nsw/the-photo-that-will-shock-the-world-jihadist-khaled-sharroufs-son-7-holds-severed-head/story-fni0cx12-1227019897582>>.

September 2014 Prime Minister Abbott announced that Australia's national security threat level had been raised from 'medium' to 'high'.<sup>283</sup>

Another significant event that occurred during this period would later become known as the 'Sydney Siege'.<sup>284</sup> The handling of the Sydney Siege by police and other authorities was subject to a joint Commonwealth/NSW Government Review.<sup>285</sup> The review was hesitant to recommend sweeping changes to Australia's counter-terrorism regime, and instead said that its findings would 'maintain broadly the current balance in our existing regulatory and legislative framework'. It observed that:

introducing substantial further controls involves a larger choice about the sort of society we wish to live in and is properly the province of the public and our elected representatives. Any further controls would be based on judgments as to whether increases in policing, surveillance and controls and the related extra burden on the taxpayer and intrusions into Australians' lives would make us appreciably safer.<sup>286</sup>

This event marks the end of the period of counter-terrorism Bills studied in this research. However, the experience of counter-terrorism law making in Australia and robust parliamentary scrutiny of that law making has continued beyond Abbott's Prime Ministership and well into Malcolm Turnbull's term in office.<sup>287</sup> This confirms the continuing relevance of my research.

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<sup>283</sup> Victoria Crow, 'Tony Abbott Raises Australia's Terror Threat to High', *news.com.au* (online), 12 September 2014 <<http://www.news.com.au/national/nsw-act/tony-abbott-raises-australias-terror-threat-to-high/news-story/ac94b904859c79c407eeca9cf3170aa4>>.

<sup>284</sup> Australian Government and New South Wales Government, *Joint Commonwealth and NSW Review: Martin Place Siege* (2015) iv. The Joint Commonwealth-NSW Review of the incident summarised the key events as follows: 'At around 8.33 am on 15 December 2014, Man Haron Monis walked into the Lindt Café, on the corner of Martin Place and Phillip Street, in the heart of Sydney's commercial district. Shortly thereafter, he produced a gun and ordered that the customers and staff be locked inside as hostages. After a standoff lasting around 17 hours, the siege ended in gunfire. Three people died: two hostages and Monis. Several of the other hostages sustained injuries': at iv.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> On 14 September 2015, Abbott was defeated in a leadership ballot by Malcolm Turnbull, who was sworn in as Prime Minister the following day. See, eg, 'Liberal Leadership Spill: Malcolm Turnbull To Become Prime Minister After Toppling Tony Abbott', *ABC News* (online), 17 November 2017 <<http://www.abc.net.au/news/2015-09-14/malcolm-turnbull-wins-liberal-leadership-ballot-over-tony-abbott/6775464>>. A number of subsequent events will be particularly fertile case studies for future research, including (1) the introduction, scrutiny and enactment of the Counter-Terrorism Bill (No 1) 2016 (see, eg, PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Bill (No 1) 2015* (15 February 2016); George



## E      *Institutional Engagement on Rights Issues and the Impact of Parliamentary Committees*

The above discussion highlights three essential considerations for the next parts of my research. First, the institutional context and political experiences summarised above explain why parliamentary committees exist and their role in Australia's parliamentary model of rights protection. Secondly, as discussed further in Part III, the key functions and features of the Australian Parliament set the parameters for identifying realistic options for improving the rights-enhancing impact of the committee system. Finally, the rights-intrusive content and proliferation of Australia's counter-terrorism laws demonstrates why we should care about the quality of scrutiny parliamentary committees provide.

As Stephenson explains, if improving the quality of rights scrutiny is understood as an inherently positive goal, the process of identifying reform options must be sensitive to the constitutional principles and values of the particular jurisdiction being considered.<sup>288</sup> This is because these principles and values govern how the institutions of government interact with each other on rights issues. As Stephenson warns, once established, the practices and structures that govern dialogue between different institutions of government are extremely difficult to shift,<sup>289</sup> and thus rights advocates should make sure that they fully understand the pre-existing institutional dynamic within the jurisdiction they are studying before developing options for reform. As noted in Chapter 2, my research seeks to confront this challenge through integrating the observations made in this chapter throughout the remaining two parts of this thesis.

By undertaking this approach, the evidence presented in Part II reveals the 'multi-stage' rights review that occurs at the federal level and exposes the direct and indirect institutional

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Brandis, Attorney-General, 'Strengthening counterterrorism legislation' (Media Release, 25 July 2016)); (2) the introduction, scrutiny and enactment of the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (see PJCIS, Parliament of Australia, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (2016); see also Sarah Moulds, *Committees in Dialogue: Parliamentary Scrutiny of the High Risk Terrorist Offenders Bill*, Australian Public Law (30 January 2017) <<https://auspublaw.org/2017/01/committees-in-dialogue/>>); and (3) the 2017 terrorist attacks in Manchester and London, which generated discussions in Australia of the need for further counter-terrorism measures (see, eg, Tony Walker 'Manchester attack: All-too-familiar scenes underscore our vulnerability to acts of terror', *The Conversation* (online), 24 May 2017 <<http://www.abc.net.au/news/2017-05-23/manchester-arena-attack-familiar-scenes-highlight-vulnerability/8550920>>).

<sup>288</sup> Stephenson, above n 1, 212.

<sup>289</sup> Ibid 8.

interactions that form part of this process.<sup>290</sup> For example, by looking for ‘hidden impact’, Part II highlights the role the bureaucracy plays in anticipating rights scrutiny by parliamentary committees, and the indirect interaction that occurs between the Parliament and the executive when engaged in this form of rights review. Similarly, by examining the impact parliamentary committees have on the content of proposed laws, Part II exposes the direct institutional engagement that occurs between the Parliament and the executive when the government fails to ‘get the balance right’ when seeking to enact rights-intrusive counter-terrorism laws.

The results of this analysis identify the characteristics that give particular committees strengths within the Australian system of rights protection. The results also demonstrate that when multiple committees work together their rights-enhancing impact is stronger. These findings in turn inform the reform options set out in Part III. In this way, my research gives practical effect to the analytical approach outlined by Stephenson<sup>291</sup> and offers jurisdiction-sensitive suggestions for how to enhance the quality of Australia’s multi-stage system of rights review.

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<sup>290</sup> Ibid 6–8. See also The Hon Chief Justice Robert French AC, ‘Foreword’ in *ibid* viiii. As discussed in Chapter 1, for Stephenson ‘multi-stage rights review’ is a useful way of characterising the model of rights protection employed by countries such as Australia, as it avoids the sometimes strained dichotomies that are present in categories of rights protection that revolve around the ‘dialogue’ between the legislature and the courts. As discussed in Chapter 1, the kinds of disagreement between the institutions of government on rights issues that are facilitated in each system can include ‘direct’ and ‘indirect’ disagreement.

<sup>291</sup> Ibid 210–19.



# PART II: APPLYING THE ASSESSMENT FRAMEWORK

## CHAPTER 4: PARTICIPATION AND LEGITIMACY

### A *Why Look for Key Participants and Evidence of Legitimacy?*

Part II of my research applies the assessment framework set out in Chapter 2 and describes the overall impact of the four parliamentary committees studied on the case study Acts. This chapter identifies the *key participants* in the parliamentary committee system and looks for evidence of whether particular committees are seen as more *legitimate* by some or all of these participants. This provides important context for the type of influence particular committees can have on decision makers in the legislative process. It can also explain why some committees have had a stronger, or different, impact on the case study Acts than others, which is important when it comes to evaluating the capacity of the committee system to contribute to rights protection. This is because the parliamentary model of rights protection relies on the Parliament and the executive voluntarily developing a culture of rights scrutiny, rather than being required to do so by threat of judicial sanction. To contribute meaningfully to this system, parliamentary committees must therefore have sufficient legitimacy in the eyes of a wide range of participants in the process, including parliamentarians, government members, public servants and the broader community. As discussed below, my research suggests that parliamentary committees that are able to generate and sustain high levels of legitimacy among those responsible for developing and drafting proposed laws are well placed to maximise their rights-enhancing impact.

This chapter argues that certain characteristics of individual committees provide them with a higher level of legitimacy or enable them to attract a more diverse range of participants, and this has implications for their capacity to influence the content of a Bill. For example, the SSCSB has well-established relationships with a narrow range of executive-dominated participants, which allows the committee to have strong behind-the-scenes impact on the content of the case study Acts. Whereas for the LCA Committees, attracting a large number of diverse participants to their inquiries is one of the most effective ways for the committees to

generate the type of public attention that sometimes translates into rights-enhancing legislative change.

As discussed further below, understanding these different characteristics of particular committees allows practical options for reform to be identified that can improve the way individual committees work together to contribute to rights protection.

## 1 *Who Are the Key Participants?*

In many ways, the entire Australian community is a participant in the parliamentary committee process which forms part of Australia's democratically elected Parliament. However, for the purpose of this evaluation, *key participants* in the parliamentary committee system are those individuals or organisations who either directly engage with the committees, or who rely upon their work when making decisions about proposed laws.

Table 4.1 provides a snapshot of the key participants identified in each of the committees being evaluated in this thesis, in the context of the case study Acts. The following four tables (Tables 4.2-4.5) provide an overview of the number and diversity of submissions and witnesses to the inquiry-based committees (the LCA Committees and the PJCIS). The relevance of these tables to my research is discussed below.

**Table 4.1: Key Participants in the Four Committees Studied**

| <i>Key participants</i> | <i>Ministers</i>  | <i>Public servants or government agencies</i>   | <i>Parliamentary committee staff</i>   | <i>Submission makers or inquiry witnesses</i>  | <i>Independent oversight or review bodies</i>   | <i>Committee members (2001–2015)</i>                                       | <i>Other parliamentarians</i>   |
|-------------------------|---|---|--|--|---|--|---|
| <b>SSCSB</b>            | Yes, through regular, formal correspondence.  | Generally limited to those drafting Bills or instructing parliamentary counsel.                                   | Committee Secretary, Legal Advisor, Secretariat staff  | Generally no submission makers or inquiry witnesses for Bills scrutiny work.                     | Rare for substantive references to be made.   | 34 members since 2001 including from minor parties.                        | No capacity for participating members.  |
| <b>LCA Committees</b>   | Yes, though most often via relevant departments; formal correspondence relatively rare. | Generally limited to those within the Attorney-General's Portfolio.   | Committee Secretary, Secretariat staff.  | Large numbers of submissions (up to 400) and a wide range of submission makers.                  | Regular references to and engagement with independent oversight bodies.                                 | 31 members since 2001 including minor parties and independents.            | Other Senators are regularly involved as participating or substitute members.           |
| <b>PJCS</b>             | Yes, though most often via relevant departments; formal correspondence relatively rare. | Focused on those agencies within statutory ambit, eg ASIO, AFP, ASIS, as well as AGD, PM&C and DIBP.              | Security cleared Committee Secretary and Secretariat staff plus specialist secondees from the relevant government organisations. | Moderate numbers of submissions (up to 230), many repeat submission makers with legal expertise. | Regular references to and engagement with national security related oversight bodies.                   | Membership includes both Houses, 38 members (between 2005 and 2015).       | Membership with approval of Prime Minister only. No capacity for participating members. |
| <b>PJCHR</b>            | Yes, through regular, formal correspondence.  | Generally limited to those drafting Bills (and Statements of Compatibility) or instructing parliamentary counsel. | Committee Secretary, Legal Advisor, Secretariat staff.   | Generally no submission makers or inquiry witnesses for Bills scrutiny work.                     | Regular references to national and international human rights bodies, and independent oversight bodies. | Membership includes both Houses, 23 members (since establishment in 2012). | No capacity for participating members.  |

**Table 4.2: Submission and Witness Participation Rates for Case Study Acts Considered By PJCIS**

| Bill   | Submissions | Witnesses<br>(organisations<br>counted as 1) |
|--|-------------|--|
| <b>Australian Citizenship Amendment (Allegiance to Australia) Bill 2015</b>              | 43          | 19   |
| <b>Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014</b>              | 46          | 18   |
| <b>Counter-Terrorism Legislation Amendment Bill (No 1) 2014</b>                          | 17          | 8  |
| <b>Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015</b> | 204         | 29   |
| <b>Inquiry into potential National Security Legislation reforms 2012</b>                 | 236         | 38   |

**Table 4.3 Submission and Witness Participation Rates for Case Study Acts and Related Inquiries Considered by LCA Committees**

| Bill  | Submissions | Witnesses<br>(organisations<br>counted as 1) |
|---|-------------|--|
| <b>Comprehensive revision of the Telecommunications (Interception and Access) Act 1979 (conducted during 2013–2015)</b> | 45          | 27   |
| <b>National Security Legislation Amendment Bill 2010</b>  | 23          | 10   |
| <b>Anti-Terrorism Bill (No 2) 2005</b>  | 294         | 21   |
| <b>National Security Information (Criminal Proceedings) Bill 2004</b>   | 24          | 5  |
| <b>Anti-terrorism Bill 2004</b>   | 28          | 6  |
| <b>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [References Committee]</b> | 435         | 22   |
| <b>Security Legislation (Anti-Terrorism) Bills 2002</b>   | 431         | 34   |

## 2 Rates and Diversity of Participation

### (a) Strong Performer: The LCA Committees

The above tables tell an important story about the different forms of participation each committee attracts. Rates and diversity of participants in formal parliamentary scrutiny can be an important indicator of the capacity of the committee system to contribute to rights protection, particularly when it comes to the inquiry-based committees such as the LCA

Committees and the PJCIS.<sup>1</sup> This is because a diverse range of participants in committee inquiries provides ‘an opportunity for proponents of divergent views to find common ground’<sup>2</sup> or, as Dalla-Pozza has explained, for parliamentarians to make good on their promise to ‘strike the right balance’ between safeguarding security and preserving individual liberty when enacting counter-terrorism laws.<sup>3</sup> In her earlier study of participation in counter-terrorism related inquiries, Dalla-Pozza found that, while there are many examples of inquiries that attract a diverse range of submission makers, overall, committees had ‘mixed success’ in functioning as a ‘conduit for diverse interests to be heard’.<sup>4</sup> As Tables 4.4 and 4.5 show, similar results emerge in the context of the case study Acts chosen for my research.

The LCA Committees have the highest overall participation rate, engaging a broad range of Senators, public servants and submission makers. For example, in two of their case study Bill inquiries, the LCA Committees attracted over 400 submissions and heard from well over 20 witnesses.<sup>5</sup> A number of the LCA Committees’ features explain why this might be the case. First, as noted in Chapter 3, the LCA Committees are ‘inquiry-based’ committees, with specific powers to call for public submissions and hold public hearings into Bills or policy issues referred to them by the Senate. Secondly, the Standing Orders governing the LCA Committees enable a large number of Senators to be directly involved as participating or substitute members.<sup>6</sup> For example, in the period between 1 January 2015 and 30 June 2015, 49 Senators

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<sup>1</sup> Kelly Paxman, *Referral of Bills to Senate Committees: An Evaluation*, Parl Paper No 31 (1998) 76.

<sup>2</sup> Harry Evans (ed), *Odgers’ Australian Senate Procedure* (Commonwealth of Australia, 10<sup>th</sup> ed, 2001) 366; see also Anthony Marinac, ‘The Usual Suspects? “Civil society” and Senate Committees’ (Paper submitted for the Senate Baker Prize, 2003) 129 <<http://www.aph.gov.au/binaries/senate/pubs/pops/pop42/marinac.pdf>>.

<sup>3</sup> Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?’ (2016) 27(4) *Public Law Review* 271, 273.

<sup>4</sup> Dominique Dalla-Pozza, ‘The Conscience of Democracy? The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws’ (Working Paper, Australasian Study of Parliament Group Conference, 2007) <<http://www.aspg.org.au/conferences/adelaide2007/Dalla-pozzo.pdf>>. In this study, Dalla Pozza considers 21 separate counter-terrorism Acts made between 2002 and 2005, and looks at the number and character of submissions made to various parliamentary committees that were inquiring into these laws.

<sup>5</sup> LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Matters* (2002). In this inquiry, the LCA References Committee received 431 submissions and heard from 65 witnesses. See also LCA References Committee, Parliament of Australia, *Inquiry into the Australian Security and Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002). In this inquiry the LCA Committee received 435 submissions and heard from 22 organisations.

<sup>6</sup> Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) cl 7.



participated in the work of the LCA Legislation Committee.<sup>7</sup> This high participation rate among Senators from diverse political and portfolio backgrounds in turn helps to attract a diverse range of regular submission makers, including those who may be opposed to the government's policy objectives in the area of counter-terrorism. For example, representatives from Civil Liberties Australia said:

The Senate Legal and Con References committee is a committee where the opposition and the Greens can get things up ... normally the opposition or one of the Greens chairs that committee, so that's where you'll get the more interesting analysis of what should be done, .... So that's a very useful committee.<sup>8</sup>

This relatively diverse rate of participation allows the LCA Committees to contribute to Australia's parliamentary model of rights protection by providing a meaningful public forum for the exchange of views on rights issues arising from proposed laws or policies.<sup>9</sup> This diversity of participation also suggests that the LCA Committees provide an effective forum for holding the executive government to account, which, as noted in Chapter 3, is a key function of the Australian Parliament. For these reasons, the reforms I recommend in Part III are designed to enhance these qualities of the LCA Committees, for example by formalising processes for selecting witnesses to guard against unconscious bias.<sup>10</sup> However, as explored further below, other changes may also be required to ensure that these relatively high rates of participation translate into strong legislative and public impact for the LCA Committees, particularly as they are forced to compete with other inquiry-based committees with cross-cutting mandates, such as the PJCIS.<sup>11</sup>

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<sup>7</sup> Senate, Parliament of Australia, *Work of the Senate* (2015) 123–4. Similar rates of participation among Senators occurred across the whole of the period examined in this thesis.

<sup>8</sup> Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016).

<sup>9</sup> For further discussion of deliberative democracy and the Australian Parliament see John Uhr, 'Parliament and Public Deliberation: Evaluating the Performance of Parliament' (2001) 24 *University of New South Wales Law Journal* 708, 712; John Uhr, 'The Constitutional Convention and Deliberative Democracy' (1998) 21 *University of New South Wales Law Journal* 875, 879; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 220, 227; Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework', above n 3, 273.

<sup>10</sup> These recommendations are set out in Table 10.1.

<sup>11</sup> *Ibid.*

(b) *A Narrower Range of Participants for the Technical Scrutiny Committees*

As Table 4.1 above shows, the SSCSB and the PJCHR attract a narrower range of key participants, both in terms of direct participation by parliamentarians and external engagement. In many ways, this is completely to be expected. As outlined in Chapter 3, the SSCSB considers itself to be in the business of ‘technical scrutiny’, which rarely calls for the type of broad public or parliamentary engagement of the LCA Committees. Moreover, as the committee itself has indicated, the unrelenting workload faced by the SSCSB makes it practically impossible for it to encourage active community participation in its Bills scrutiny work.<sup>12</sup>

As Chapter 3 explains, the SSCSB also has highly formalised ways of communicating with proponents of Bills that revolve around the exchange of correspondence, and it generally exercises deference and restraint when formulating its final advice on the compatibility of a Bill with its scrutiny criteria.<sup>13</sup> As a result, the committee’s closest working relationships are with a relatively narrow range of public servants who are directly involved in drafting Bills, or providing assistance to Ministers who are required to respond to the committee’s requests for further information. As discussed in Chapter 3, the PJCHR also seeks to emulate this ‘technical scrutiny’ role, at least when it comes to its Bills scrutiny function,<sup>14</sup> and as a result has a similarly limited range of participants.

As set out in Table 4.1, the relatively limited range of participants in the Bills scrutiny functions of the PJCHR and the SSCSB has implications for the capacity of these committees to have a strong rights-enhancing impact on the content of Australia’s counter-terrorism laws. For example, as explored further in Chapter 7, this characteristic makes these committees much

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<sup>12</sup> See, eg, SSCSB, Submission to Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (2014).

<sup>13</sup> As noted in Chapter 3, the SSCSB’s recommendations are generally designed to alert the Senate to key issues to consider, and it rarely makes specific recommendations for legislative change.

<sup>14</sup> As discussed in Chapter 3, the PJCHR also has specific statutory functions that include inquiring into ‘any matter relating to human rights which is referred to it by the Attorney-General’: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 7(c). These powers have been used five times, eg, PJCHR, Parliament of Australia, *Examination of the Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013); PJCHR, Parliament of Australia, *Review of the Stronger Futures in the Northern Territory Act 2012 and related legislation* (2016).

more reliant on the ‘hidden impact’ they are able to exert on those responsible for developing counter-terrorism laws before they are introduced into Parliament.

(c) *The PJCIS Experience*

The PJCIS sits somewhere in the middle of the spectrum when it comes to diversity of participation, both in terms of its membership, and the types of submissions it receives to its public inquiries. Unlike the LCA Committees, the membership of the PJCIS is tightly prescribed and leaves no room for participating or substitute members.<sup>15</sup> The PJCIS also regularly attracts parliamentarians with experience in the military, law enforcement or related fields, and to date has included only members of the major political parties (although minor parties and independents are not explicitly excluded).<sup>16</sup> This lack of diversity among the membership of the PJCIS led some interviewees to express concern about the potential for this to influence the ‘culture’ of the committee and its approach to public hearings. For example, the CEO of Civil Liberties Australia said:

The Parliamentary Joint Committee on Intelligence and Security is nothing other than a straight extension of the security forces and the police. ... Of the 6–8 regulars it is headed by spooks, or ex-spooks or ex-military or ex-police type people. ...

It’s a total insiders club. They adopt whatever’s put up by the police and security services as gospel and that is taken to be virtually what will apply unless you can overturn it ... with dramatic proof that it won’t work. ... The starting point of that committee is that the police and security services will get 100% of what they want unless somebody from outside the organisation can absolutely demonstrate that it shouldn’t be that way. And that is wrong. Fundamentally wrong. ... We would suggest that the people who should be on the committee like that are the ones that have voiced concerns. They should not be the ex-spooks, the ex-

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<sup>15</sup> *Intelligence Services Act 2001* (Cth) pt 4, s 28 (2) provides that: ‘The Committee is to consist of 11 members, 5 of whom must be Senators and 6 of whom must be members of the House of Representatives.’ Further details regarding the Chair and Membership of the PJCIS are prescribed in *Intelligence Services Act 2001* (Cth) sch 1, pt 3.

<sup>16</sup> For example, as at September 2017 the Chair of the PJCIS was Mr Andrew Hastie MP, who was an army officer. Two other current members of the PJCIS were previously military officers (Senator David Fawcett and the Hon Dr Mike Kelly MP AM) and one is a former police officer (Mr Jason Wood MP).

police, the ex-military people, because we know what their attitudes are, we know that they bring to bear a particular attitude which is totally dismissive of the community point of view.<sup>17</sup>

Lydia Shelly from the Muslim Legal Network was also ‘concerned about the membership of the PJCIS not being very diverse either in terms of political allegiance or life experiences’ and noted that this gave rise to negative experiences for witnesses,<sup>18</sup> particularly for groups and individuals who fall outside of the common list of repeat submission makers to public inquiries into counter-terrorism law. For example, Ms Shelly explained that, for non-legally trained community members, even finding out about a parliamentary inquiry into a law that might affect their rights was challenging:

It is very difficult for everyday Muslims to participate in parliamentary committee inquiries. Often these inquiries are not well known. Key community groups don’t find out about them at all, or if they do it is too late for them to coordinate and draft a submission. It seems that the process is set up to capture only a very small group of representatives.

Being legally trained was very important, and pretty much essential to understanding the laws and participating in the inquiry at such short notice. Other Muslim community groups who were interested in participating struggled due to the time frames, and the lack of capacity to get across the detail of the legislation in such a short time and then confront such a hostile committee hearing.<sup>19</sup>

The Muslim Legal Network’s experiences may have been shaped by the subject matter of the committee inquiry and the public nature of the committee hearing, as well as the lack of diversity in the membership of the PJCIS. However, others have also commented on the barriers individuals and groups face when seeking to access committee hearings and to be invited to appear as witnesses.<sup>20</sup> For Paxman, these barriers arise, at least in part, from the dominance of sophisticated, usually legal qualified, organisations or government departments who are frequently invited by the committees themselves to make submissions or appear as

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<sup>17</sup> Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016).

<sup>18</sup> Interview with Lydia Shelly, Muslim Legal Network (telephone, 2 June 2016).

<sup>19</sup> Ibid.

<sup>20</sup> See, eg, Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016); Paxman, above n 1.

witnesses, as discussed below.<sup>21</sup> Paxman describes these organisations and departments as the ‘usual suspects’.<sup>22</sup>

*(d) The Usual Suspects*

Tables 4.4 and 4.5 below suggest that in the case of the LCA Committees’ and the PJCIS’s inquiries into counter-terrorism law, the ‘usual suspects’ are government departments and agencies, legal bodies (such as the Law Council of Australia), statutory bodies (such as the AHRC and the INSLM) and academics (including groups such as the Gilbert & Tobin Centre for Public Law).

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<sup>21</sup> Paxman, above n 1.

<sup>22</sup> Ibid.

**Table 4.4: Frequent Submission Makers to PJCIS as Percentage of Total Number of Submissions Received**

| Bill  | AGD | ASIO | AFP | Oversight agency                          | Other government department or agency   | AHRC | Law Council | Other legal body | Legal academic individual | Legal academic group | % of total submissions received |
|---|-----|------|-----|---|---|------|-------------|------------------|---------------------------|----------------------|---------------------------------|
| Australian Citizenship Amendment (Allegiance to Australia) Bill 2015              | ✓   | ✓    | ✓   | ✓   | Immigration   | ✓    | ✓           |                  | 5                         | ✓                    | 73%                             |
| Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014              | ✓   | ✓    | ✓   | 3 (IGIS, Ombudsman, Privacy Commissioner) | 4 (Customs, Foreign Affairs and Trade, Immigration, Australian Crime Commission (ACC))                              | ✓    | ✓           | 2                | 2                         | ✓                    | 94%                             |
| Counter-Terrorism Legislation Amendment Bill (No 1) 2014                          | ✓   | ✓    | ✓   | ✓   | Australian Signals Directorate (ASD)  | ✓    |             | ✓                |                           | ✓                    | 100%                            |
| National Security Legislation Amendment Bill (No 1) 2014                          | ✓   | ✓    |     | 2 (IGIS, Privacy Commissioner)            | ASIS  |      | ✓           | ✓                |                           | ✓                    | 70%                             |
| Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 | ✓   | ✓    | ✓   | 3 (Ombudsman, Privacy Commissioner)       | 3 (ACC, Australian Commission for Law Enforcement Integrity (ACLEI) Australian Securities and Investment Commission | ✓    | ✓           |                  | ✓                         |                      | 41%                             |
| Inquiry into potential National Security Legislation reforms 2012                 | ✓   | ✓    | ✓   | ✓   | 6 (ASIS, DSD, ACC, ACLEI, ASIC, Australian Taxation Office)   | ✓    |             | 3                |                           | 2                    | 42%                             |

**Table 4.5 Frequent Submission Makers to LCA Committees as a Percentage of Total Number of Submissions Received**

| Bill  | AGD | ASIO | AFP | Oversight agency        | Other government department or agency | AHRC | LCA | Other legal body | Legal academic individual | Legal academic group | % of total submissions received |
|---|-----|------|-----|-------------------------|---------------------------------------|------|-----|------------------|---------------------------|----------------------|---------------------------------|
| Comprehensive revision of the Telecommunications (Interception and Access) Act 1979       | ✓   | ✓    | ✓   | 3 (IGIS, Ombudsman AIC) | 3 (ACC, ATO, ACLIE)                   |      | ✓   | ✓                | ✓                         |                      | 48%                             |
| National Security Legislation Amendment Bill 2010   | ✓   |      | ✓   |                         | ✓ (ACC)                               | ✓    | ✓   | ✓                | ✓                         | 2                    | 90%                             |
| Anti-Terrorism Bill (No 2) 2005   | ✓   | ✓    | ✓   | 2                       | ✓ (AUSTRAC)                           | ✓    | ✓   | ✓                | 2                         | ✓                    | 57%                             |
| National Security Information (Criminal Proceedings) Bill 2004                            | ✓   |      |     |                         |                                       |      | ✓   | ✓                |                           |                      | 60%                             |
| Anti-terrorism Bill 2004  | ✓   |      | ✓   |                         |                                       |      |     | ✓                | ✓                         | ✓                    | 83%                             |
| Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 | ✓   |      | ✓   |                         |                                       |      | ✓   | 6                | 2                         |                      | 54%                             |
| Security Legislation (Anti-Terrorism) Bills 2002  | ✓   | ✓    | ✓   |                         | 3 (AUSTRAC, Customs, Immigration)     |      | ✓   | 4                | 4                         | ✓                    | 47%                             |

While generalisations are hard to make across a range of different inquiries into different Bills, Tables 4.4 and 4.5 suggest that, on average, the ‘usual suspects’ submission makers made up well over half of the witnesses to the PJCIS and LCA Committees’ inquiries into the case study Acts. The dominance of these categories of submission makers is particularly pronounced with respect to the PJCIS, which held six inquiries where 70 per cent or more witnesses were from the ‘usual suspects’ category.<sup>23</sup>

This reliance on ‘the usual suspects’ may be a result of the relatively informal processes adopted by committees and their secretariats when it comes to calling for submissions and selecting witnesses. As Paxman explains: ‘Most submissions to bills inquiries are by groups or individuals who are already aware of the bill’s existence, or who are contacted by politicians or their staff, or by the committee secretariat’.<sup>24</sup>

It is also common for the inquiry committees to develop their own ‘lists’ of submission makers, with whom they regularly liaise and whom they actively encourage to make submissions or appear as witnesses, as was confirmed by a number of interviews conducted for this thesis.<sup>25</sup>

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<sup>23</sup> It is noted that the inquiries into the early counter-terrorism reforms, in particular the LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Related Matters* (2002) and the LCA Legislation Committee, Parliament of Australia, *Inquiry into the Australian Security and Intelligence Organisation Amendment (Terrorism) Bill 2002 and Related Matters* (2002) attracted high participation and diversity in terms of witnesses to the LCA Committee’s hearings, perhaps because these Bills sought to introduce considerable new, intrusive powers for law enforcement and intelligence agencies. This can be contrasted with some of the inquiries conducted by the PJCIS, which concerned Bills that built upon or refined existing powers rather than introducing new powers. However, this does not fully explain the comparative lack of diversity seen in inquiries conducted by the PJCIS relating to the introduction of new powers in the case of the Foreign Fighters Bill and the Citizenship Bill, which both introduced significant new powers for executive agencies but failed to attract a diverse range of witnesses. See PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014); PJCIS, Parliament of Australia, *Advisory Report on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

<sup>24</sup> Paxman, above n 1, 81.

<sup>25</sup> See, eg, Interview with Sophie Dunstone, former Secretary of the Senate Standing Committee on Legal and Constitutional Affairs (Canberra, 23 May 2016). See also Interview with Public Servant (Canberra, 28 September 2016). This process was also confirmed by committee members, such as a current Liberal Senator, who said: ‘[W]e tend to, when we’re putting an inquiry out, and this is true for all committees, [say] here’s the list of people who submitted, but then you also say to the professional staff, well who else has been active in this space, who’s writing various academic blogs or industry magazines, or who’s expressed an opinion, and then you go out to those people to invite comment, and then you’ve got the open invitation approach, where you know, you publish in the various newspapers or websites or whatever of the fact that this inquiry is coming up.’ Interview with a current Liberal Senator for South Australia (Adelaide, 23 August 2016).



A former parliamentary committee secretariat staff member explained that, in their experience, when selecting inquiry witnesses the secretariat would:

look at the submissions and say, ‘Well, these are the people you have to interview or go to a public hearing on, and here are a selection of people you might want to contact.’ Then you consider the individual submissions, and unless there’s one that’s really compelling, well they’re just really individuals with views that you might use as references for your report.<sup>26</sup>

For some, this reliance on a relatively narrow pool of high-quality and sophisticated submission makers is sensible and appropriate, particularly for committees such as the LCA Committees and the PJCIS, which are often required to deal with complex legal issues in their Bills scrutiny function. It means, for example, that those with the capacity and expertise to contribute are actively engaged in the scrutiny system. As the former Chair of the LCA Legislation Committee observed in 2010:

A lot of legislation we deal with in this country would not be shaped into quality legislation were it not for the Law Reform Commission, the Law Council and some of the legal experts who are outside of the Parliament. We rely on their expertise heavily.<sup>27</sup>

However, consistent reliance upon the ‘usual suspects’ can give rise to the perception that, when it comes to public inquiries involving these submission makers, ‘the same old paths are being trodden ... with predictable outcomes’.<sup>28</sup> As discussed below, this in turn dilutes the inquiry-based committees’ perceived legitimacy as a deliberative forum, particularly if the voices of those most likely to be negatively affected by the proposed law are excluded from the inquiry, or ‘drowned out’ by a chorus of ‘usual suspects’.

For these reasons, I recommend changes to the practices of the inquiry-based committees to encourage more active engagement with potential submission makers and witnesses from a

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<sup>26</sup> Interview with Public Servant (Canberra, 28 September 2016).

<sup>27</sup> Patricia Crossin, ‘The Future of Senate Committees: Challenges and Opportunities’ (Speech delivered at the Senate Committees and Government Accountability Forum, Canberra, December 2010) 139 <<http://www.aph.gov.au/binaries/senate/pubs/pops/pop54/c11.pdf>>.

<sup>28</sup> Paxman, above n 1, 83–4. Paxman’s research suggests that the dominance of the ‘usual suspects’ might continue to increase over time, as those groups with ‘representatives who have become familiar with inquiry procedures by regularly writing submissions or appearing as witnesses are often able to represent their organisation’s interests more effectively’. This in turn allows them to attract the resources they need to continue to respond to inquiries in a timely fashion.

broad range of organisations and interest groups.<sup>29</sup> Of course, improved engagement with a broader cross-section of the community may not automatically result in more (or more diverse) submissions: there may be some sectors of the community that are unwilling to engage or unaware of the benefits of engagement with parliamentary committees for their particular advocacy strategy or interests. For this reason, I also recommend changes to help demonstrate the value of committee participation for the advocacy objectives of a broader range of groups and individuals, for example by documenting the influence committee recommendations can have on the content of legislation.<sup>30</sup> These recommendations align with the general agreement among past and present committee members interviewed that a more diverse range of views adds to the quality of the inquiry process.<sup>31</sup>

As will be discussed further in Part III, the above analysis reveals an important tension in the role and impact of different types of parliamentary committees when it comes to scrutinising rights-engaging legislation. On the one hand, the ability to attract and reflect upon a diverse range of perspectives when inquiring into a Bill has positive deliberative implications for the capacity of the committee system to contribute to Australia's parliamentary model of rights protection. On the other hand, as Chapter 5 documents, other committee attributes, such as specialist skills and trusted relationships with the executive, can also lead to a consistently strong legislative impact, which can also have important rights-enhancing results. This tension between committees as deliberative and authoritative forums – and in particular, how these different forums are viewed and used by key participants in the committee system – is discussed in the next part of this chapter.

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<sup>29</sup> See discussion in Chapter 10 and Tables 10.1 and 10.2.

<sup>30</sup> See discussion in Chapter 10 and Tables 10.1 and 10.2.

<sup>31</sup> See, eg, Interview with a current Liberal Senator for South Australia (Adelaide, 23 August 2016); Interview with Andrew Bartlett, former Australian Democrats Senator for Queensland (telephone, 4 August 2016); Interview with Penny Wright, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee, former Australian Greens Senator for South Australia (Adelaide, 11 August 2016); Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

## B *Evidence of Legitimacy*

The previous section of this chapter identified the key participants in the formal parliamentary scrutiny system and looked at the relevance of different rates and diversity of participation in the inquiries conducted by the committees evaluated in this thesis. The next section asks whether and why those key participants consider the parliamentary committee system, or particular components of the system, to play a *legitimate* role in the features and functions of the Australian Parliament set out in Chapter 3. As noted above, legitimacy (or political authority, as discussed above)<sup>32</sup> is critical if the committee system is going to contribute to Australia's parliamentary model of rights protection and, as discussed below, the relationship each committee has with parliamentarians, the public and those involved in developing and drafting counter-terrorism laws often determines its overall impact on a Bill.

### 1. *The Challenge of Gathering Views on Legitimacy*

As discussed in Chapter 2, finding evidence of whether or not a committee is seen as more or less legitimate demands consideration of both objective sources of evidence (such as reference to the work of committees in public service guidelines or annual reports of regular submission makers)<sup>33</sup> and the subjective views of the key participants themselves. For example, whether a committee is seen as more legitimate than others may depend upon whether the participant is an 'insider' (such as a member of the government or a public servant) or an 'outside observer' (such as a commentator) or perhaps an ordinary member of the public, with no particular knowledge or interest in the committee system. As a result, my research draws upon interviews conducted with past and present members of parliamentary committees and their staff, regular submission makers and a number of public servants, government officials and statutory bodies who are responsible for developing, drafting and reviewing counter-terrorism laws.<sup>34</sup> My research deliberately targets this range of participants, rather than the public at large, as they are most likely to reveal the contextual information needed to supplement the other documentary material presented in this part, such as insights into whether past committee

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<sup>32</sup> See discussion in Chapter 2, Section E(3).

<sup>33</sup> This evidence is considered in further detail in Chapter 7.

<sup>34</sup> For further information about the interviews conducted for this research see Appendix A.

scrutiny has been taken into account when developing, drafting or debating a proposed new law.

This approach is designed to infuse my research with the real-life experiences of those directly involved in the committee system; however, it also makes it impossible to completely avoid the risks inherent in undertaking interviews with a selective and relatively small sample of key participants.<sup>35</sup> I am aware, for example, that some of my findings could be affected by factors such as the interviewee's seniority and experience, their geographical location, and their political allegiance. In addition, my analysis includes case studies relating to counter-terrorism, which may generate particularly strong responses in those asked to comment on the legitimacy of certain committees. However, it is important to note that indications of legitimacy derived from these interviews are not relied upon in this thesis to provide *proof* of a committee's impact on a particular counter-terrorism law (which is instead tested by looking for evidence of legislative, public and hidden impact). Rather this material is used to provide a fuller picture of the *context* in which the particular committees operate, and to begin to understand what types of changes to the system would be accepted as realistic by those directly involved in its work. When used in this way, the subjective nature of the interview material adds colour to the documentary evidence used to determine impact without undermining the integrity of my research.

## 2. *A Spectrum of Legitimacy among Committees*

My research suggests that, when it comes to assessing legitimacy, a spectrum of committee experiences emerges. At one end are the SSCSB and the PJCIS, which are attributed high levels of legitimacy by almost all categories of participants, and particularly by those directly involved in the law-making process, such as proponents of Bills, public servants, parliamentary counsel and parliamentarians. At the other end is the PJCHR, a much newer committee clearly struggling to gain legitimacy in the eyes of a wide range of participants. A special place is held by the LCA Committees, whose legitimacy is sometimes questioned by the government of the day, but whose relatively broad and diverse range of participants consistently attribute at least

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<sup>35</sup> Discussed further in Appendix A.

moderate levels of legitimacy across a wide range of functions. This spectrum is summarised in Table 4.6, and discussed further below.

### 3. *Tensions Between the Deliberative and Authoritative Attributes of Committees*

Looking for evidence of legitimacy within the committee system also illustrates the important tension between the *deliberative* and *authoritative* attributes of parliamentary committees. The deliberative attributes of the system (discussed in further detail in Chapter 6) are those that facilitate meaningful forums for the public and a diverse range of parliamentarians to engage in and contribute to the law-making process.<sup>36</sup> These attributes are most commonly observed with respect to the inquiry-based committees, who regularly hold public hearings and have politically diverse and relatively dynamic committee membership. The authoritative attributes of the committee system are those features of individual committees, including membership, processes and relationships with the executive, that command respect among key decision makers in the system. This authority can manifest in terms of legislative impact (such as amendments being made to implement committee recommendations) or behind-the-scenes influence (such as public servants developing legislation in line with the standards set by scrutiny committees). As discussed further below, both of these attributes – deliberative and authoritative – can generate legitimacy for a particular committee, and sometimes pull against each other to reduce or dilute the respect or political authority a committee demands. Of central interest to this thesis is how these tensions play out when committees work together as a system, and what changes could be made to minimise the tension between these attributes, and improve the rights-enhancing impact of the committee system on federal laws. This discussion, which takes place in Part III, is informed by the views of key participants on the legitimacy attributed to particular committees set out in Table 4.6 and considered further below.

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<sup>36</sup> As noted above, the hallmarks of deliberative decision making processes are: diverse sources of information, inclusivity, cooperation, open-mindedness, and opportunity for reflection. For further discussion see Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 4, 22-23.

**Table 4.6 Evidence of Legitimacy by Committee**

|                       | <i>Proponents of a Bill</i>  | <i>Public servants</i>  | <i>Parliamentary committee staff</i>  | <i>Submission makers</i>  | <i>Independent bodies</i>   | <i>Media</i>   | <i>Parliamentarians</i>  |
|-----------------------|--|---|---|---|---|--|--|
| <b>SSCSB</b>          | Strong: evidenced by generally timely responses to requests and broad acceptance of scrutiny criteria. | Strong: evidenced by scrutiny criteria entrenched as part of 'best practice' for public servants.                                   | Strong: evidenced by long service provided by secretariat staff.  | Moderate: not seen as a forum for directly advancing rights concerns, but regular reference to SSCSB in other inquiries.  | Moderate: rare to explicitly refer to SSCSB in reports.                                 | Moderate: rare to explicitly refer to SSCSB in media reports but generally no criticism. | Moderate: strong positive feedback in interviews, but rare to explicitly refer to SSCSB directly in Hansard. |
| <b>LCA Committees</b> | Mixed views: can be seen as legitimate, but may also be seen as politicised.                           | Moderate: regular participants in hearings but lack of consistent scrutiny criteria can make it difficult to anticipate key issues. | Moderate to strong, despite heavy and varied workload.  | Moderate to strong: high volumes of submissions consistently received and a relatively diverse range of submission makers.  | Moderate to strong: regular reference to and praise for the work of the LCA Committees. | Moderate: some explicit public discussion; however not all positive.                     | Moderate: regular references to the committee in Hansard, mainly praise but some criticism.                  |
| <b>PJCS</b>           | Strong: particularly among major parties. Minor parties and independents more sceptical.               | Strong: particularly by those working most closely on counter-terrorism and national security related legislation.                  | Strong: staff subject to security clearance and include technical experts from law enforcement and intelligence agencies. | Moderate: high-quality submissions consistently received but less diversity.  | Strong: regular references by key oversight and review bodies.                          | Moderate: some explicit public discussion, mostly positive.                              | Strong: regular positive references in Hansard, with some criticism from minor parties and independents.     |
| <b>PJCHR</b>          | Mixed views: can be seen as legitimate, but may also be seen as largely irrelevant.                    | Moderate: scrutiny criteria yet to become entrenched; however, effort applied to preparing SoCs and responding to PJCHR's requests. | Moderate: high quality secretariat staff, but not all share same vision for role of PJCHR.                                | Weak to moderate: not seen as forum for advancing concerns re counter-terrorism laws, but some reference to the work of the PJCHR in submissions to other committees. | Weak to moderate: some explicit references to the work of the PJCHR in reports.         | Weak: rare to find examples of media discussion of the work of the PJCHR.                | Weak: rare to find references to the PJCHR in Hansard, with some minor party exceptions.                     |

(a) *SSCSB*

Of all the committees studied, the SSCSB appears to generate the most legitimacy (or command the most political authority) among the key participants interviewed, due to its well accepted ‘technical scrutiny’ character, and the fact that its scrutiny criteria resonates strongly with those involved in the development of legislation.<sup>37</sup> This is also evident from the extent to which the SSCSB’s scrutiny criteria are closely reflected in formal guidance materials prepared by government departments.<sup>38</sup> Interviews with parliamentarians suggest that other parliamentary committees also attribute strong value and legitimacy to the SSCSB and its reports. For example, former Senator Crossin said that when she was Chair of the LCA Legislation Committee she would:

always cross-reference the work of the SSCSB, as a first step when getting across the issues. We would draw upon the work of the SSCSB and the other committees whenever we could. The secretariat staff would always be right across the SSCSB report.<sup>39</sup>

These comments were supported by secretariat staff of other committees, such as former Secretary of the LCA Committees Sophie Dunstone, who explained that there are now formal processes in place to help ensure parliamentary committee secretariat staff are aware of the findings and reports of the SSCSB.<sup>40</sup>

Submission makers also spoke of the value of the SSCSB reports, particularly in the context of their submissions to other parliamentary committees. For example, a legal submission maker said: ‘I refer to them quite a lot. If they’ve raised concerns or made recommendations about something then we tend to note them in our submissions because that often bolsters the arguments we’re making.’<sup>41</sup>

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<sup>37</sup> For example, OPC officers underscored the importance of the SSCSB’s scrutiny criteria when drafting Bills: ‘We will draft the provision, but the instructor will have to justify why it deviates from the [SSCSB] criteria or the Guidelines to the Parliament and to the parliamentary committees’: Interview with Peter Quiggin, First Parliamentary Counsel, Office of Parliamentary Counsel (Adelaide, 3 August 2016). See also Interview with Meredith Leigh and Naomi Carde, Office of Parliamentary Counsel (Canberra, 24 May 2016).

<sup>38</sup> This is explored in detail in Chapter 7.

<sup>39</sup> Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>40</sup> Interview with Sophie Dunstone, former Secretary of the LCA Committee (Canberra, 23 May 2016).

<sup>41</sup> Interview with Legal Submission Maker (Canberra, 24 May 2016).

The SSCSB's Alert Digest system is held in particular regard by many key participants, and 'operates as an "early warning" system, which alerts others to the possible need for further examination of provisions of concern from a scrutiny perspective'.<sup>42</sup>

The high regard with which the SSCSB is held by its key participants, and in particular, the infusion of the SSCSB's scrutiny criteria within the parliamentary and public service culture, gives it particular strengths when it comes to contributing to Australia's parliamentary model of rights protection, but also limits its capacity to influence the content of federal laws. In this way, the views on the SSCSB in Table 4.6 neatly illustrate the tension described above. For many participants interviewed, the SSCSB is highly respected because it sits outside of the political process, and provides an opportunity for parliamentarians to undertake a non-partisan analysis of a Bill.<sup>43</sup> These same qualities make the SSCSB less diverse in membership and less deliberative in process. In other words, it is because the SSCSB distances itself from the political qualities of the Australian Parliament that it commands the most authority for many participants interviewed, but, as Chapter 5 documents, this same attribute also works to limit its capacity to have a direct legislative impact on the case study Acts.

(b) *PJCIS*

This tension between the deliberative and authoritative roles of committees is also illustrated by the range of views expressed by key participants with respect to the PJCIS in Table 4.6. Many key participants attributed strong legitimacy (or political authority) to the PJCIS because of its strong legislative impact, major-party membership and bipartisan approach to developing recommendations.<sup>44</sup> However, as discussed below, these same attributes also led others to question the committee's capacity to provide a meaningful deliberative forum for rights protection.

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<sup>42</sup> SSCSB, Parliament of Australia, *Inquiry into the future direction and role of the Scrutiny of Bills Committee 2011* (2012) [4.26].

<sup>43</sup> See, eg, Interview with Andrew Bartlett, former Australian Democrats Senator for Queensland (telephone, 4 August 2016); Interview with Meredith Leigh and Naomi Carde, Office of Parliamentary Counsel (Canberra, 24 May 2016); Interview with Official A, Attorney-General's Department (Canberra, 23 May 2016).

<sup>44</sup> This was also noted in Department of Prime Minister and Cabinet, *2017 Independent Intelligence Review* (2017) 118–19, 121–3.



This tension is illustrated by the views of ‘insiders’ interviewed, such as public servants and committee members, who describe the PJCIS as being held in ‘high regard’ among the executive, in part due to the seniority of its membership and also due to the fact that it is ‘a bipartisan committee that makes recommendations that then the government largely supports’.<sup>45</sup> Former PJCIS member Senator Robert Ray described PJCIS members as ‘genuinely prepared to put the national interest first and work through the issues’.<sup>46</sup> He said that this ‘was different to other committees, where I, like many others, acted in a very partisan way’<sup>47</sup> and he described the PJCIS as ‘looking for solutions’ and developing compromises ‘so as to ensure that the recommendation it wanted to make was able to get through’.<sup>48</sup> The PJCIS’s regular use of closed hearings to gather security-sensitive information from agencies,<sup>49</sup> and the committee’s practice of utilising secondees from departments or agencies to provide technical assistance to the PJCIS secretariat staff,<sup>50</sup> were also cited as examples of measures to foster positive working relationships with key agencies. For example, an Attorney-General’s Department (AGD) official described the secondee arrangement with the PJCIS as follows:

the Committee, through the secretariat, seeks [secondee] assistance and quite logically so, because in a very short space of time it’s able to get across a very technical area of law. So the [Attorney-General’s Department] might provide a staff member to assist [the committee] to get across the complexities of a Bill, and answer some simple inquiries so that the committee doesn’t have to ask everything on notice.<sup>51</sup>

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<sup>45</sup> Interview with Cameron Gifford, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>46</sup> Interview with Robert Ray, former Australian Labor Party Senator for Victoria (telephone, 23 November 2016).

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> See *Intelligence Services Act 2001* (Cth) sch 1, pt 3 Procedure.

<sup>50</sup> PJCIS, Parliament of Australia, *Annual Report 2014–2015* (2015) 3. Mr Gifford explained the process of selecting and using secondees as follows: ‘The PJCIS has got to the stage where it’s called on departments and agencies where there’s a particularly large inquiry and particularly where there’s not necessarily a long lead time with the inquiry, to ask for secondments. So we have certainly supported that over the last couple of years in terms of making sure that we are providing resources, either coordinating throughout department to make sure the agencies provide somebody, or providing a departmental representative as well, and they then provide a research assistant role. [They provide] nothing but factually based information to the committee’s questions so that the committee is really well placed to understand the proposals that are being taken forward.’ Interview with Cameron Gifford, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>51</sup> Interview with Official B, Attorney-General’s Department (Canberra, 30 May 2016).

The requirement for PJCIS secretariat staff to have security clearance, and their high level of experience and expertise, was also cited as enhancing the committee's legitimacy, particularly among the public service and the law enforcement and intelligence community. As AGD National Security Branch officer Mr Cameron Gifford said:

The people at the secretariat who support the PJCIS have been there for a number of years. ... [They] also need a security clearance, so that means that [the secretariat staff] have been through that process and been in that position for some time. That's not necessarily the same for the human rights committee, and I understand that there's been a little bit more turnover in terms of the secretariat support for it.<sup>52</sup>

These 'insider' views can be contrasted with the more critical perspectives offered by other, 'outsider' participants, who express scepticism of the PJCIS's close and trusted working relationship with government and question its legitimacy as a rights-protecting forum.<sup>53</sup> As a former senior member of an oversight body said:

I have some concerns that the PJCIS could be captured by the agencies, and I am really concerned by the use of secondees to the secretariat. I have seen examples of the same person who has worked on the legislation for the agencies then on the secretariat for the committee. This presents a big risk for the impartiality of the committee. I have also seen committee members who are so uncritical of the submissions of agencies. This pro-agency bias is concerning.<sup>54</sup>

The capacity to hold private hearings, which is available to all parliamentary committees but is used frequently by the PJCIS, also gave rise to some questions about the PJCIS's legitimacy for some interviewees. For example, a former senior member of an oversight body said:

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<sup>52</sup> Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016).

<sup>53</sup> See, eg, Interview with a former senior member of an oversight body (telephone, 8 November 2016); Interview with Robert Ray, former Australian Labor Party Senator for Victoria (telephone, 23 November 2016); Interview with Lydia Shelly, Muslim Legal Network (telephone, 2 June 2016); Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016). Former LCA Committee Secretary Sophie Dunstone also expressed some reservations about the use of departmental or agency secondees to assist parliamentary committee secretariat staff: 'I guess from my professional perspective I have reservations about things like having a departmental person seconded here ... Senators and committees have a high degree of trust in us, ... we take privilege and those types of things really seriously. Conversations and advice and decision making made within the committee and between the committee and the secretariat is not disclosed, so that always makes me a bit nervous I have to say.' Sophie Dunstone, former Secretary of the LCA Committees (Canberra, 23 May 2016).

<sup>54</sup> Interview with a former senior member of an oversight body (telephone, 8 November 2016).

A lot of ... information gathering is done in closed sessions, and some of it has to be done in this way, but it really does detract from the purpose of parliamentary scrutiny, which is about public accountability. It doesn't allow others to question the evidence of the agencies. There is no one in those hearings able to contest the agencies' claims, except the IGIS. This is a big contrast to other parliamentary committees, where evidence of departments and agencies is robustly tested by a range of other experts and submission makers. So the role of the IGIS is really important to give the PJCIS a different view.<sup>55</sup>

These different views illustrate the tension between the effectiveness of the PJCIS when it comes to legislative impact (which, as Chapter 5 discusses, appears to be generally rights-enhancing), and its capacity to generate respect among non-government submission makers as a meaningful deliberative forum for rights protection. In other words, the discussion above suggests that for some key participants the PJCIS is a high-impact, authoritative committee, while for others it risks being held captive by the executive and its agencies. While this tension is unlikely to be completely resolved, my research suggests that it can be minimised to improve the rights-protecting potential of the committee system. As discussed further in Part III, I argue for changes to the system of committees to preserve the attributes of the PJCIS that give rise to its strong legislative impact, whilst at the same time encouraging other committees to help fulfil the deliberative role sought by 'outsider' participants in the system.

*(c) LCA Committees*

As discussed further in Part III, the LCA Committees provide the counterpoint to the SSCSB when it comes to the tension between the deliberative and authoritative roles of parliamentary committees. The information in Table 4.6 suggests that the LCA Committees are valued as deliberative forums, but do not always attract high levels of legitimacy, particularly among key participants who actively seek to influence the executive government. This is because the diverse membership of the LCA Committees (which include members from major and minor political parties as well as substitute and participating members), coupled with the broad range of issues they inquire into, can be seen by some as diluting their influence in terms of legislative impact. As the interview material reveals, there appears to be some hesitation among key participants when it comes to the capacity of the LCA Committees to influence legislation,

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<sup>55</sup> Ibid.

alongside general praise for the committees' deliberative function. For example, Civil Liberties Australia said that 'the Senate Legal and Constitutional Committee is the most important committee from our perspective'.<sup>56</sup> This is also reflected in the LCA Committees' strong performance when it comes to rates and diversity of participating in their public inquiries into counter-terrorism Bills, and by the discussion in Chapter 6 relating to public impact, which explains that the LCA Committees are often referenced and praised by post-enactment review bodies<sup>57</sup> and in parliamentary debates.<sup>58</sup> However, not all interviewees consider the LCA Committees to be preferable forums over other committees to make submissions on counter-terrorism laws. For example, a legal submission maker said:

In my experience when we've put up submissions to the Senate Legal and Constitutional Affairs committee, it's not a particularly effective committee in so far as a lot of recommendations made to it by a range of organisations they tend not to be accepted. Whereas the Parliamentary Committee on Intelligence and Security it has a reputation of trying to achieve bipartisan results. I think that forces members to really negotiate and sit down and discuss the issues of relevance and so that seems to be a committee that's more open to submissions being made from other organisations and possibly accepting some of those recommendations.<sup>59</sup>

This comment demonstrates the important relationship between legitimacy (or political authority) and legislative impact, which can be particularly relevant for sophisticated submission makers looking to 'forum shop' to ensure that their submissions have the best chance of being reflected in committee recommendations that result in legislative change.<sup>60</sup>

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<sup>56</sup> Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016).

<sup>57</sup> For example references to the LCA Committees were included in the following reports that considered the case study Acts: Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006); Security Legislation Review Committee, Commonwealth, *Report of the Security Legislation Review Committee* (2006); Hon Mark John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) (Clarke Report).

<sup>58</sup> See Table 6.3 in Chapter 6.

<sup>59</sup> Interview with Legal Submission Maker (Canberra, 24 May 2016).

<sup>60</sup> As will be discussed further below, since the election of the 44th Parliament in 2013, the PJCIS inquiries into proposed counter-terrorism Bills have completely displaced inquiries into the same Bills by the LCA Committees, and the PJCIS has enjoyed a 100 per cent strike rate when it comes to translating its recommendations for legislative change into enacted amendments.

Other submission makers cited the LCA Committees' heavy and broad-ranging workload as a barrier to having a consistently strong impact on counter-terrorism laws. For example, some public servants interviewed explained that it was much harder to elucidate a clear set of principles, or to anticipate what concerns the LCA Committees may raise, due to the committees' broad mandate<sup>61</sup> and politically diverse and changeable membership.<sup>62</sup>

Despite these mixed views, members and former members described the LCA Committees as particularly valuable spaces for backbench parliamentarians to have an influence on government policy. For example, former LCA Legislation Committee Chair and ALP Senator Patricia Crossin said that the committee allows you to have:

access to good quality submissions – particularly from the 25 or so 'usual suspects' in the legal area ... and you can help show up significant flaws in the legislation that the Minister's office or the department has overlooked, or due to sloppy drafting of [Explanatory Memoranda] etc – these types of issues almost always resulted in legislative amendments to remedy the issue.<sup>63</sup>

Former Senator Crossin also spoke of the opportunity to help shape policy or the content of legislation through her role as LCA Committee Chair, observing that, even in the context of counter-terrorism Bills that had strong bipartisan support, the committee was able to draw Ministerial attention to rights concerns and push for legislative change.<sup>64</sup>

Taken together, these views illustrate the other side of the tension between deliberative and authoritative roles described with respect to the SSCSB. In other words, the LCA Committees are valued and respected among key participants due to their ability to attract a large number and diverse range of submission makers, and due to their politically diverse membership. However, for those looking to influence government legislation, these same features can present risks and dilute the political authority of the LCA Committees. As discussed in Part III, this has implications for the LCA Committees' future capacity to contribute to the

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<sup>61</sup> Interview with Official A, Attorney-General's Department (Canberra, 23 May 2016).

<sup>62</sup> See, eg, Interview with Official B, Attorney-General's Department (Canberra, 30 May 2016); Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016).

<sup>63</sup> Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>64</sup> Ibid.

parliamentary model of rights protection. I argue that the challenge for those seeking to improve the parliamentary model of rights protection at the federal level is to encourage the LCA Committees to continue to provide a meaningful deliberative forum for public inquiry into proposed counter-terrorism laws without duplicating the work of other, high-impact inquiry-based committees such as the PJCIS.

*(d) PJCHR*

As Table 4.6 suggests, the PJCHR has struggled to attract strong levels of legitimacy from the majority of key participants. Chief among the reasons for this is the relative youth of the committee, the contested nature of the PJCHR's role and purpose, and a number of structural and procedural issues that lead to its reports not being seen as timely or useful.

*(i) The Contested Role and Purpose of the PJCHR*

Many people interviewed expressed concern about the confusion that surrounds the 'proper' role and purpose of the PJCHR, and considered this a threat to the committee's legitimacy.<sup>65</sup>

As an interviewee explained:

[T]he Act says that the job of the committee is to assess legislation for its compatibility, against human rights standards, and to report to both Houses of Parliament. And that's the end of the matter really if you want to take the Act as providing that answer to that question, so that is an educative role. It's not a role to ... prevent the passage of legislation that is incompatible with our human rights obligations. But ... if you look at the circumstances in which it was introduced, there's often a little bit of confusion. ... [S]o when you look at what was said in the second reading speech, for example, then the purpose of the committee, ... is to ensure that human rights considerations are taken into account, not just at this end point, but all the way through the process. And then there are elements of the design of the approach that support that.<sup>66</sup>

Other key participants were not prepared to accept that 'technical scrutiny' was the only legitimate purpose of the PJCHR, and envisaged a more proactive, deliberative role for the

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<sup>65</sup> See, eg, Interview with B (Canberra, 23 May 2016); Interview with Simon Rice, former Legal Advisor to the Parliamentary Joint Committee on Human Rights (Sydney, 24 May 2016); Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

<sup>66</sup> Interview with B (Canberra, 23 May 2016).

committee, where non-government organisations were actively invited to provide evidence to the committee on the rights compatibility of a Bill, in addition to information being provided by government. For example, PJCHR Legal Advisor Dr Aruna Sathanpally explained:

If you think that human rights involve political and policy issues then you need evidence, not just technical advice on the law, to help reach conclusions. If the only evidence is from the department, this does not put the committee in the best position to reach conclusions in certain cases. [The PJCHR] could do the job much better if supported by civil society.<sup>67</sup>

The first legal advisor to the PJCHR, Professor Andrew Byrnes, also envisaged proactive engagement by the committee with submission makers and advocacy groups. However, Byrnes also considered the PJCHR to offer particularly strong opportunities to bring human rights considerations to the attention of law and policy makers at the pre-introduction phase, and to ‘have a washback effect or to bring about cultural and bureaucratic change’.<sup>68</sup> Campbell and Morris made similar observations in their 2015 review of the PJCHR, where they saw the committee as having a primary role in providing the:

right sort of opportunities for the executive and parliamentary branches of government to become better informed about, and more focussed on, the human rights issues which arise in the course of preparation and enactment of new legislation.<sup>69</sup>

For others, it was not just the contested role and purpose of the PJCHR, but also the contested nature of its human rights mandate, that posed a threat to the committee’s legitimacy.<sup>70</sup> As an interviewee explained:

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<sup>67</sup> Interview with Aruna Sathanpally, Legal Advisor, Parliamentary Joint Committee on Human Rights (telephone, 23 June 2016).

<sup>68</sup> Andrew Byrnes, ‘Human Rights Under the Microscope: Reflections on Parliamentary Scrutiny’ (Speech delivered at Law Society of South Australia Continuing Professional Development Program, Adelaide, 11 December 2014) <<http://www.ahrcentre.org/sites/ahrcentre.org/files/mdocs/Byrnes%20--%20%20PJCHR%20-%20handout%20for%20Adelaide%20talk%20December%202014%20revised.pdf>>

<sup>69</sup> Tom Campbell and Stephen Morris, ‘Human rights for democracies: a provisional assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011’ (2015) 34(1) *University of Queensland Law Journal* 7, 8.

<sup>70</sup> For example, current INSLM, the Hon Roger Gyles QC, said: ‘I think the Human Rights Committee is useful and it draws attention to the issue and for people who are not international lawyers, like me, it does educate the people involved. It’s difficult area though, ... because you are dealing with something that is not domestic law, it’s international law, and not everyone accepts that in the same way’: Interview with Roger Gyles QC, Independent Monitor of National Security Legislation (telephone, 6 December 2016).

Human rights is ... a subject matter that is very polarising. It has the appearance of being ethics laden, morality laden, so that's a difficult thing to pursue totally as a technical matter. ... Often there's going to be room for legitimate differences in view, but it can be hard to keep those away from essential policy preferences. So you know, people choose an outcome based on their policy preference in that space, and then give differences in views. So I think it's the nature of human rights itself that [is] so polarising and so, the idea of the committee report saying this legislation is incompatible with the right to 'X' is something that is very difficult for committee members to come to terms with.<sup>71</sup>

As a number of former PJCHR members have reflected, not all members of the committee or the broader Parliament have a background in international law and some have a deep scepticism of human rights.<sup>72</sup> For some of these rights sceptics, the PJCHR can be seen as a potentially confrontational committee, pushing a particular international human rights law agenda that has at times been rejected by the government of the day. As former Chair of the PJCHR Senator Smith said:

I made a very, very conscious decision that I would uphold the scrutiny function of the committee even at the risk of pitting myself against the government. The government was quite willing to publicly surrender its human rights obligations to pursue laws and policies in the public interest and that is absolutely within their rights to do so. What is needed [from the committee's point of view] is a strong and rigorous defence of that choice with reference to the human rights standards and the particular policy. The merits of the policy should be debated in the [inquiry-based] committees. That is the place for compromises to be made.<sup>73</sup>

For others, it is the way the PJCHR has approached its human rights analysis that poses a risk to its legitimacy. For example, former INSLM Bret Walker SC praised the work of the PJCHR, but suggested that a more proactive approach could be adopted to identifying and outlining the

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<sup>71</sup> Interview with B (Canberra, 23 May 2016).

<sup>72</sup> Interview with Penny Wright, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee, former Australian Greens Senator for South Australia (Adelaide, 11 August 2016); Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016). For further discussion see George Williams, 'Scrutiny of Primary Legislation Principles and Challenges: Where are We Now and Where are We Headed?' *Australia-New Zealand Scrutiny of Legislation Conference*, Parliament House, Perth, 12 July 2016.

<sup>73</sup> Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).



rights-protecting impact a proposed new counter-terrorism law may have, as well as its negative or rights-infringing consequences.<sup>74</sup>

Some submission makers interviewed praised the intention behind the establishment of the PJCHR, but were cynical of the extent to which it could have any impact on the shape or content of laws such as counter-terrorism laws. For example, Civil Liberties Australia said:

The Parliamentary Committee on Human Rights has done as good a job as it can do. Basically, it's like in the old days of cricket they used to have a long stop behind the wicket keeper. That's what that committee is. It's a long stop. It's not in the main game, it's too late to be helping the action, etc.<sup>75</sup>

For others, the impact of the PJCHR will only truly be felt once it has been in operation for a longer period of time.<sup>76</sup> For example, former Chair of the PJCHR Senator Smith said:

The PJCHR needs time to entrench its principles particularly with respect to the House members. This requires more work for the House members to gain an understanding of the scrutiny mechanisms generally and then to understand the particularly human rights standards. It will take time to entrench that scrutiny function.<sup>77</sup>

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<sup>74</sup> For example, former INSLM, Mr Bret Walker SC explained: 'I think the Human Rights Committee could perhaps more routinely ... start with the rights of what I might call the people who just want to be left alone, and get on with their lives in freedom and peace ... And if you do that, I think a lot of other things fall into place more naturally': Interview with Bret Walker SC, former Independent Monitor of National Security Legislation (Sydney, 30 May 2016).

<sup>75</sup> Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016).

<sup>76</sup> This view was shared by an interviewee who explained: '[The] Regulations and Ordinances Committee and Scrutiny of Bills Committee are part of the furniture .... As new members come in quite often they get put on scrutiny committees early in the piece. A big part of our role is to essentially encourage them to approach it as a technical inquiry, as a parliamentarian, rather than as a party member. Both of the scrutiny committees had existential issues when they were first established, and that was really to be expected. It took time to get that status as being part of the furniture. Now, the Human Rights Committee is a new committee and it doesn't have that status yet': Interview with B (Canberra, 23 May 2016). As Senator Don Farrell said: 'My instinctive feel would be simply a question of time [before PJCHR scrutiny criteria are more entrenched in parliamentary culture]. The Scrutiny of Bills Committee has much more entrenched processes whereas the Human Rights Committee is new and in time they'll develop their own procedures': Interview with Don Farrell, Australian Labor Party Senator for South Australia (Adelaide, 15 November 2016).

<sup>77</sup> Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

*(ii) Structural and Procedural Risks to PJCHR's Legitimacy*

Structural and procedural features, such as staffing, the handling of dissent and timing of tabling of reports, have also been identified as risks to the PJCHR's political authority and capacity to influence government legislation.<sup>78</sup> For example, while the first years of the PJCHR's operation were characterised by consensus-style reporting,<sup>79</sup> in later years dissenting reports were included in the rights analysis of the PJCHR. The deteriorating consensus style of reporting undertaken by the PJCHR has been cited by Williams and Burton as contributing to the PJCHR's lack of overall impact on the content and debate of proposed new laws.<sup>80</sup> Reflecting on the emerging dissent within the PJCHR, former PJCHR member Penny Wright said:

I think it was a really laudable aim to have a consensus report because, in a sense, this isn't about whether members of the committee think what is being proposed is a good idea or a bad idea. The question of what is required for compliance with human rights law is actually pretty settled in most cases. So it was often very clear. It wasn't a maybe; it was a yes or a no. But, in my later time on the committee, we were rarely able to get the committee to acknowledge that.

I feel that, in some ways, the dissent within the committee came about because some latter members of the committee had not worked hard enough to educate themselves about the nature of human rights law.

So, the concern I have is that, where the report routinely contains majority and minority views, it undermines the effectiveness of the report and people can then pick and choose what side they are on, depending on their policy objectives. The outcome is more politicised than

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<sup>78</sup> The timing of the tabling of PJCHR reports is discussed in Chapter 6, Section A.

<sup>79</sup> This early consensus-style report was praised by many as a sign of a bipartisan commitment to meaningful rights scrutiny by committee members. For example, the first legal advisor to the PJCHR, Professor Andrew Byrnes, observed: 'The PJCHR has thus been an exemplar of the tension between the nonpartisan and principled process of scrutiny by MPs and Senators in their role as Parliamentarians, and their duties and the pressures on them as members of political parties': Andrew Byrnes, 'Human Rights Under the Microscope: Reflections on Parliamentary Scrutiny', above n 68.

<sup>80</sup> See, eg, George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 257.

principled. It becomes almost irrelevant what the actual human rights law is. That is my main concern.<sup>81</sup>

However, others considered dissent to be part of the PJCHR's natural development, having regard to the accepted practice of dissenting reports being regularly issued by other committees in the system, such as the LCA Committees. For example, former PJCHR Legal Advisor Professor Rice expressed the view that a dissenting view is of no concern provided it is well reasoned, with reference to the human rights standards that form part of the PJCHR's mandate.<sup>82</sup> However, in his time on the committee Professor Rice said he:

didn't see a single dissent in the reports which was reasoned. The dissents are nakedly unsubstantiated. They simply, after a long, long explanation about how one part of the committee gets to a conclusion, the other part of the committee says, 'and we say this'.<sup>83</sup>

### *(iii) Clarifying the Role and Rights Contribution of the PJCHR*

Taken together, these comments highlight the need to clarify whether the legislative review role<sup>84</sup> of PJCHR should be one of 'technical scrutiny' or a more deliberative inquiry function. My research suggests that this is important not just for structural and procedural matters, such as the timing and format of the PJCHR's reports, but also for the PJCHR's overall legitimacy and political authority.

As explored further in Part III, if these roles remain blurred or confused, the PJCHR runs the risk of being rendered ineffectual and uninfluential. Unlike the other committees discussed above, when it comes to Bills scrutiny, the PJCHR will be neither deliberative nor authoritative,

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<sup>81</sup> Interview with Penny Wright, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee, former Australian Greens Senator for South Australia (Adelaide, 11 August 2016).

<sup>82</sup> Interview with Simon Rice, former Legal Advisor to the Parliamentary Joint Committee on Human Rights (Sydney, 24 May 2016).

<sup>83</sup> Ibid.

<sup>84</sup> My focus on is the PJCHR's Bills scrutiny role; however, I acknowledge that, like the SSCSB, the PJCHR also has the power to hold public inquiries. As noted in Chapter 3, this inquiry-based function has been used relatively infrequently but in 2017 the PJCHR held a public inquiry into pt IIA of the *Racial Discrimination Act 1975* (Cth) that attracted large numbers of submissions and included multiple public hearings. See, eg, PJCHR, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)* (2017). As discussed further in Part III, I argue that investing in the PJCHR's technical scrutiny role is the best way to maximise its rights-protecting capacity when working together with other committees in the system.

and thus struggle to attract legitimacy among key participants. If, on the other hand, the role of the PJCHR is clear and its strengths and weaknesses complemented by other committees in the system, it has strong potential to contribute in a meaningful way to Australia's parliamentary model of rights protection. As discussed further below, I argue that the PJCHR's role should be clarified in favour of its technical scrutiny function, at least with respect to its legislative review function. As explored in detail in Part III, such a 'technical scrutiny' would building upon the existing features of the committee that are most well respected by key participants in the system, and would encourage the PJCHR to more closely emulate the work practices of the SSCSB when it comes to the timeliness and format of its Bills scrutiny reports. While this approach may be disappointing to some rights advocates, particularly those who had hoped the Australian PJCHR would one day more closely resemble its UK counterpart, my research strongly warns against making more radical structural change to a committee that is already at risk of being sidelined or ignored. Instead, my recommendations reflect a more cautious, consolidating approach that recognises that some of the most significant rights-enhancing impacts of the committee system occur 'behind the scenes' and depend upon members of the executive being able to accurately predict and proactively respond to the future parliamentary scrutiny of the laws they initiate.

### *C Summary of Findings on Legitimacy*

This chapter has begun to illustrate the important tension between the deliberative and authoritative roles of parliamentary committees that runs through each of the committees studied in my research. It demonstrates that high rates of participation from a diverse range of parliamentarians and submission makers can generate respect among key participants, but may also come at the risk of political authority. It also demonstrates that the relationship between a particular committee and the executive can both generate legitimacy (through legislative influence) and give rise to scepticism (through concerns about lack of independence and transparency), depending on the perspective of key participants in the system. This chapter also demonstrates that committees with more tightly controlled membership, entrenched scrutiny criteria and less public engagement can be highly influential for those working behind the scenes on the development of legislation. This tension is explored further in Chapter 5, which considers the legislative impact each of the four committees had on the case study Acts. It also sets the scene for the discussion in Part III, where I argue that this tension can be minimised when parliamentary committees work together as a system, and the individual strengths and

weaknesses of a particular committee can be complemented by other committees in the system.

## CHAPTER 5: LEGISLATIVE IMPACT

### A *Why Look for Legislative Impact?*

This chapter sets out evidence of the legislative impact the parliamentary committees had on the case study Acts. As discussed in Chapter 2, evidence of legislative impact – such as whether a successful legislative amendment has been made in response to a specific committee recommendation – can provide an objective source of evidence that points to a committee’s overall influence. The nature of the legislative amendment can also provide a strong source of evidence about the committee’s contribution to Australia’s parliamentary model of rights protection, particularly if it is rights-enhancing (improves the compatibility of the Bill with international human rights standards, or constitutional or common law rights) or rights-remedying (such as removing any rights-abrogating features).

As noted in Chapter 4, there is also a reciprocal relationship between a committee’s legislative impact and its legitimacy, particularly when the Bill in question relates to a key policy platform for the government. As discussed above, often the political authority attributed to a committee is based on its capacity to influence legislative outcomes; however, if the relationship between the committee and the executive is seen as too close, the committee may lose respect from key participants, particularly non-government submission makers and non-government parliamentarians. Other committees, such as the SSCSB, achieve legislative impact through less direct means, generating strong levels of legitimacy among those most active at the pre-introduction stage, but less visible during parliamentary debates.

As noted in Chapter 1, I have been generally surprised by the extent to which the committees studied were able to generate legislative change to the case study Acts.<sup>1</sup> Governments generally resist making changes to legislation that they have already publicly committed to and introduced into Parliament. When they do accept a committee’s calls for changes to be made, and introduce and pass amendments, it is a strong sign that they consider the committee to be a valued and legitimate component of the parliamentary process – even if there are also political

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<sup>1</sup> For a summary of these legislative changes see Appendix D.

incentives to make the change, such as the need to negotiate a hostile Senate. This chapter demonstrates that, in a number of cases, Australian governments of different political persuasions accept and implement the legislative recommendations made by parliamentary committees, even when they have made a strong and public commitment to the counter-terrorism Bill at the time of introduction.<sup>2</sup> In addition, this chapter shows that a large proportion of the legislative changes made following committee recommendations were rights-enhancing in nature (even if they did not fully remedy the rights-abrogating features of the Bill). Further, the evidence in this chapter suggests that, when Bills are subject to scrutiny or review by multiple parliamentary committees, the nature of the legislative impact is more significant and more likely to be rights-enhancing. For this reason, the evidence in this chapter is critical to the overall themes of my research that focus on the role the parliamentary committee system plays in Australia's model of rights protection.

However, my research also heeds the warnings of those scholars referred to in Chapter 2 when it comes to relying on evidence of legislative impact as an indicator of a committee's overall influence or role in the parliamentary system. I acknowledge, for example, the need for caution when identifying the causal relationship between the work of the committee and the legislative change, and when understanding the significance of the legislative change made. A myriad of factors, including potent political factors, could influence the decision of an individual parliamentarian to introduce or support a legislative amendment. This may be particularly pronounced in the context of an issue such as counter-terrorism, which provokes strong views and attracts media coverage, providing a platform for political ambitions of all types to play out.<sup>3</sup> Then there are factors associated with the make-up of the Senate, and the need for the government to secure support for the passage of its legislative agenda from independents,

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<sup>2</sup> These themes are also explored in Laura Grenfell and Sarah Moulds, 'The Role of Committees in Rights Protection in Federal and State Parliaments in Australia' (2018) 41(1) *University of New South Wales Law Journal* (Advance).

<sup>3</sup> As noted in Chapter 2, a number of scholars have sought to avoid these issues by selecting a broad spectrum of thematic areas for their evaluations of parliamentary committees including: Carolyn Evans and Simon Evans, 'Evaluating the Human Rights Performance of Legislatures' (2006) 6 *Human Rights Law Review* 546; Meghan Benton and Meg Russell, 'Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons' (2013) 66 *Parliamentary Affairs* 772; George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469.

minor parties or the opposition.<sup>4</sup> I do not ignore these issues, but seek to factor them in by adopting the following approach:

- explicitly acknowledging the institutional and political context in which a particular case study Bill was introduced, scrutinised, amended and passed;<sup>5</sup>
- looking for clear documentary evidence that the legislative change can be directly attributed to the work of a parliamentary committee, for example by reference to a committee's recommendation in the supplementary Explanatory Memorandum accompanying the proposed legislative amendments;
- distinguishing between substantive and inconsequential or minor legislative amendments; and
- testing these findings against the views of a range of key participants in the committee system<sup>6</sup> and the other forms of impact a parliamentary committee can have on the law-making process, described in my research as 'public' and 'hidden' forms of impact.<sup>7</sup>

This allows legislative impact to remain a powerful indicator of the overall influence of the committees studied on the content of the case study Acts, without ignoring the equally powerful evidence set out in Chapters 4, 6 and 7.

To begin the analysis of legislative impact, Table 5.1 set outs the 'strike rate' of the inquiry-based committees (LCA Committees and PJCIS) in terms of translating their recommendations into successful legislative amendments. These committees are the focus of this table as their recommendations are frequently articulated in terms of specific amendments to a Bill, which allows a crude but important calculation of how many recommendations are translated into legislative amendments. The 'technical' scrutiny committees (SSCSB and the PJCHR) are not included in Table 5.1 as their recommendations rarely refer explicitly to legislative amendments, and are instead more commonly couched in terms of matters for the Senate or the

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<sup>4</sup> Geoffrey Lindell, 'How (and Whether?) to Evaluate Parliamentary Committees – From a Lawyer's Perspective' (2005) August *About the House* 55.

<sup>5</sup> This is primarily addressed in Chapter 3 but is also considered in this chapter.

<sup>6</sup> For example, see the references to a range of key participants' views on legitimacy set out in Chapter 4.

<sup>7</sup> See Chapters 6 and 7.

Parliament to consider.<sup>8</sup> However, the work of the SSCSB and the PJCHR is included in the following analysis of the overall scrutiny experience for each case study Bill. This allows findings to be made about the legislative impact of each committee on a case study Bill, and also demonstrates the overall legislative impact of multi-committee scrutiny.

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<sup>8</sup> See also discussion in Chapter 3.



**Table 5.1 Overview of Legislative Impact**

| Bill  | No of successful amendments made to Bill        | Amendments directly attributable to committee recommendations   | Committee strike rate              |
|---|---|---|------------------------------------|
| Australian Citizenship Amendment (Allegiance to Australia) Bill 2015                      | 9   | 27 PJCIS recommendations, 25 reflected in legislative amendments (2 changes to the Explanatory Memorandum (EM))   | PJCIS 100%                         |
| Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014                      | 79  | 37 PJCIS recommendations reflected in legislative amendments  | PJCIS 100%                         |
| Counter-Terrorism Legislation Amendment Bill (No 1) 2014                                  | 30  | 16 PJCIS recommendations reflected in legislative amendments  | PJCIS 100%                         |
| Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015         | 51  | 39 PJCIS recommendations reflected in legislative amendments.   | PJCIS 100%                         |
| National Security Legislation Amendment Bill 2010   | Nil   | 4 LCA Committee recommendations, 3 non-legislative (2 not adopted), 1 legislative (and not adopted).  | LCA Committees 0%                  |
| Independent National Security Legislation Monitor Bill 2010                               | 9   | 12 Senate Finance and Public Administration Committee (SFPAC) recommendations, 8 reflected in legislative amendments (3 non-legislative).   | SFPAC 100%                         |
| Anti-Terrorism Bill (No 2) 2005   | 74  | 51 LCA Committee recommendations, 24 were fully implemented by amendments, 13 partially implemented and 5 non-legislative. 8 rejected   | LCA Committees 85%                 |
| National Security Information (Criminal Proceedings) Bill 2004                            | <i>Initial Bill lapsed, new Bill introduced</i> | 13 LCA Committee recommendations made. 3 accepted and reflected in substantive changes to the re-introduced Bill, 1 partially implemented and 9 not adopted.  | LCA Committees 30%                 |
| Anti-terrorism Bill 2004  | 8   | 8 LCA Committee recommendations, 5 reflected in amendments, 1 further amendment supported by Senate but not passed by House.  | LCA Committees 65%                 |
| ASIO Legislation Amendment (Terrorism) Bill 2003  | 11  | 11 amendments made reflecting the previous LCA Committee and PJC on ASIO, DSD and ASIS recommendations with respect to the 2002 Bill.   | LCA Committees and PJ ASIO 100%    |
| Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 | 63  | 15 PJC on ASIO, DSD and ASIS recommendations, 12 reflected in amendments, 2 partially reflected and 1 not adopted. 27 LCA Committee recommendations, 13 reflected in amendments, 8 rejected, 5 rejected but alternative model proposed, 1 non-legislative | PJC ASIO 75%<br>LCA Committees 65% |
| Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Other Bills               | 10  | 7 LCA Committee recommendations, 4 reflected in amendments, 3 rejected.   | LCA Committees 60%                 |

## B *Evidence of Legislative Impact*

Table 5.1 above provides a broad-brush snapshot of the success rates of the inquiry-based committees in turning their recommendations into legislative outcomes and conveys the strikingly high success rate of the PJCIS, particularly since 2014. It also demonstrates a consistently high success rate (60 per cent or over in almost all cases) experienced by the LCA Committees. Although further research is required to confirm whether this experience is typical of all Bills subject to committee review, these results suggest that both the PJCIS and the LCA Committees are having a relatively strong legislative influence on the case study Acts. This tentative conclusion is considered further below.

To assist in the presentation of material in this chapter, in the next section I analyse three ‘phases’ of committee scrutiny of the case study Acts. These three phases help navigate the five tranches of counter-terrorism law making discussed in Chapter 3:

- Phase 1 was a period where parliamentary committees’ scrutiny of proposed counter-terrorism Bills took place at a fast and furious pace, in a climate where it was still politically viable (at least from the perspective of some members of the opposition and minor parties) to challenge the necessity of certain proposed counter-terrorism measures. During this phase, both the LCA Committees and the PJC on ASIO, DSD and ASIS (which later became the PJCIS) had a modest to moderately strong legislative impact. This phase corresponds to the first three ‘tranches’ of counter-terrorism law making set out in Chapter 3, all of which occurred under the Howard Government between 2001 and 2007.
- Phase 2 was a period of relatively robust post-enactment review of the case study Acts (both by parliamentary committees and independent bodies) following the election of the Rudd Government, and continued through the Gillard Government. During this phase, the legislative impact of committee scrutiny on proposed new counter-terrorism measures depended heavily on the relationship between the committees’ recommendations and the findings of other independent review bodies with respect to pre-existing counter-terrorism laws. This phase corresponds with the ‘Time for Review’ period and ‘tranche 4’ of counter-terrorism law making discussed in Chapter 3 and spans the period 2007–13.

- Phase 3 saw the emergence of the PJCIS as a committee with strong legislative impact, which coincided with the establishment of the PJCHR, and the effective ‘sidelining’ of the LCA Committees as a forum for reviewing counter-terrorism legislation. Phase 3 coincides with tranche 5 of counter-terrorism law making described in Chapter 3 and covers the period from the election of the Abbott Government until the end of 2015.

In the background of each of these phases is the scrutiny work being undertaken by SSCSB and (since 2012) the PJCHR. As will be discussed below, both of these committees had a discernible legislative impact, but it was less direct than either the PJCIS or the LCA Committees at the height of their respective influence.

The following analysis of these three phases allows for a set of preliminary findings to be made about the overall legislative impact of the parliamentary committee system on the case study Acts. These preliminary findings can then be considered alongside the other components of the assessment framework applied in my research, the public and hidden impacts.

### *C Three ‘Phases’ of Parliamentary Scrutiny of the Case Study Bills*

#### *Phase 1: Fast and Furious Scrutiny*

Phase 1 covers the period from 2001 until 2007, when the Howard Government was in power. Six of the case study Acts were introduced and passed during this period:

- SLAT Acts (CSA 1);
- ASIO Bill 2002 (CSA 2);
- ASIO Act 2003 (CSA 3);
- *Anti-Terrorism Act 2004* (Cth) (CSA 4);
- *National Security Information (Criminal Proceedings) Act 2004* (Cth) (CSA 5); and
- Control Orders Act (CSA 6).

I describe this phase as ‘fast and furious scrutiny’ due to: (a) the speed at which these new provisions were introduced and scrutinised by parliamentary committees, and (b) the political climate that existed at the time, wherein it was still political viable for non-government parliamentarians and some government backbenchers to directly question the need for the

introduction of new counter-terrorism laws, having regard to existing criminal laws, and law enforcement and intelligence powers.

In this context, the LCA Committees, with their broad membership and strong capacity to conduct wide-ranging and popular public inquiries, were influential when it came to turning recommendations into legislative change. This can be seen with respect to the SLAT Acts, the *Anti-Terrorism Act 2004* (Cth) and the Control Orders Act, but also the ASIO Bill 2002 and ASIO Act 2003 which received an unprecedented level of parliamentary scrutiny and underwent significant change from introduction to enactment. The more specialist PJC on ASIO, DSD and ASIS also featured prominently in the scrutiny of the ASIO Bill 2002. The SSCSB's constant role in reviewing the laws introduced in this phase is less visible; however, as the examples below demonstrate, the issues raised by the SSCSB regularly featured strongly in the reports and recommendations of other parliamentary committees and were sometimes reflected in successful amendments to the Bill.

*(a) The SLAT Acts (CSA 1)*

As noted in Chapter 3, the SLAT Bills<sup>9</sup> marked the beginning of the Howard Government's legislative response to the 11 September 2001 terrorist attacks in the United States.<sup>10</sup> After quickly passing through the House, the SLAT Bills were referred to the LCA Legislation Committee for inquiry and report.<sup>11</sup> Despite having only five weeks to conduct its inquiry, the LCA Legislation Committee received 431 submissions and held public hearings in Sydney, Melbourne and Canberra. A majority report was issued, supported by members from both major political parties.<sup>12</sup> The report contained seven majority recommendations for amendments to the Bill, including that:

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<sup>9</sup> The SLAT Bills package included the Suppression of the Financing of Terrorism Bill 2002 (Cth), the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth), the Border Security Legislation Amendment Bill 2002 (Cth), the Telecommunications Interception Legislation Amendment Bill 2002 (Cth), and the Security Legislation Amendment (Terrorism) Bill 2002 (Cth).

<sup>10</sup> See Chapter 3, Section D(1). See also SC Res 1373, UN SCOR, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001); Nathan Hancock, 'Terrorism and the Law in Australia: Supporting Materials' (Research Paper No 13, Parliamentary Library, Parliament of Australia, 2002) 25–7.

<sup>11</sup> The SLAT Bills were first introduced into Parliament on 13 March 2002, and on 20 March 2002, after passing through the House of Representatives, were referred to the LCA Legislation Committee for inquiry and report by 3 May 2002.

<sup>12</sup> LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 32. Dissenting comments were provided by the

- a defence to the offence of treason be provided relating to the provision of humanitarian aid;<sup>13</sup>
- the definition of ‘terrorist act’ be amended to require the action or threat of action to be undertaken with the intention to influence government by undue intimidation or undue coercion, or to unduly intimidate the public or a section of the public;<sup>14</sup>
- absolute liability be removed as an element of the proposed terrorist act offences, and be replaced with requirement that the person knew or was reckless as to the required element in the proposed new offences;<sup>15</sup>
- the proposed proscription of terrorist organisations regime be amended to ensure, among other things, that the regime ‘does not vest a broad and effectively unreviewable discretion in a member of the executive’ and that it provides for ‘adequate judicial review of the grounds for declarations of proscription’;<sup>16</sup>
- the Attorney-General review the current law on access to stored communications of delayed messages services with a view to introducing a warrant regime;<sup>17</sup>
- the proposed financing of terrorism offences be amended to include an element of intent;<sup>18</sup> and
- changes be made to the proposed asset-freezing provisions.<sup>19</sup>

Four of these recommendations were reflected in successful amendments to the Bills that were directly attributed to the work of the LCA Legislation Committee and that were rights-enhancing in nature. As a result, the SLAT Bill was amended to:

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Australian Democrats. See ‘Additional Comments and Points of Dissent, by Senator Brian Greig on behalf of the Australian Democrats’ in LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (8 May 2002) 81–7.

<sup>13</sup> Ibid Recommendation 1.

<sup>14</sup> Ibid Recommendation 2.

<sup>15</sup> Ibid Recommendation 3.

<sup>16</sup> Ibid Recommendation 4.

<sup>17</sup> Ibid Recommendation 5.

<sup>18</sup> Ibid Recommendation 6.

<sup>19</sup> Ibid Recommendation 7.

- tighten the proposed definition of ‘terrorist act’ to be inserted in the Criminal Code;<sup>20</sup>
- remove absolute liability and the reverse onus in respect of fault from the terrorism offences;<sup>21</sup>
- create a defence to the offence of treason relating to the provision of humanitarian aid;<sup>22</sup> and
- make changes to the proscription regime, including requiring proscription to occur via regulation thereby enabling parliamentary review.<sup>23</sup>

Amendments were also made to the Bills to require the SLAT Acts to be reviewed by the PJC on ASIO, ASIS and DSD (later to become PJCIS) in three years.<sup>24</sup> The SLAT Bills were also scrutinised by the SSCSB, and some legislative amendments, such as those that removed the absolute liability features of the proposed new offences and improved oversight of the terrorist organisation proscription regime, reflected key concerns raised by that committee.<sup>25</sup>

These important legislative changes to the SLAT Bills package are particularly noteworthy having regard to both the short time frames for conducting such a large and complex scrutiny task and the political context for the reforms, coming soon after the 11 September 2001 attacks and after the Howard Government successfully won the 2001 election with a ‘tough on terror’ mandate.

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<sup>20</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills (Cth), Items 5 and 8. These items respond to the LCA Legislation Committee’s Recommendation 2.

<sup>21</sup> Ibid Items 11, 13, 14. These items respond to the LCA Legislation Committee’s Recommendation 3.

<sup>22</sup> Ibid Item 4. This item responds to the LCA Legislation Committee’s Recommendation 1, for example by inserting ‘forms an intent’ into the treason offence.

<sup>23</sup> Ibid Items 12, 15, 16, 17, 18 and 19. These items respond to the LCA Legislation Committee’s Recommendation 4. The new proscription provisions would involve the making of a *regulation* proscribing an organisation, when the Minister is ‘satisfied on reasonable grounds’ that the organisation is either engaged in, planning, preparing, assisting or fostering a terrorist act or is listed in a UNSC resolution. Such a regulation would be tabled in Parliament and subject to disallowance.

<sup>24</sup> Ibid Items 1 and 20. This was discussed in the LCA Committee’s report, but did not form one of the LCA Committee’s formal recommendations.

<sup>25</sup> SSCSB, Parliament of Australia, *Alert Digest No 3 of 2002* (20 March 2002) 49–52; SSCSB, Parliament of Australia, *Report No 4 of 2002* (2002). Key issues of concern included: incorporating absolute liability into proposed new terrorist organisation offences; the proposed new proscription of terrorist organisation powers and related offences; and access to judicial review under *Administrative Decisions (Judicial Review) Act 1977* (Cth).

*(b) ASIO Bill 2002 and ASIO Act 2003 (CSA 2 and 3)*

The ASIO Bill 2002 was the second major counter-terrorism reform package introduced by the Howard Government. This Bill is a particularly interesting case study as it was considered by four separate parliamentary committees and underwent significant legislative change from introduction to enactment.

As noted in Chapter 3, the ASIO Bill 2002 proposed to introduce a new questioning and detention warrant regime (Q&D regime) wherein ASIO officers would be empowered to apply for a warrant to detain, search and/or question persons before a prescribed authority.<sup>26</sup> The proposed Q&D regime included the power to detain a person (without charge or being suspected of committing an offence) for up to 48 hours, with successive warrants available. The detention could be incommunicado and the person subject to the warrant would have no rights to decline to give information or produce a document. Like the SLAT Bills, the ASIO Bill 2002 was referred to the LCA Legislation Committee;<sup>27</sup> however, it was also referred to the PJC on ASIO, ASIS and DSD for report, with the same tight five-week time frame.<sup>28</sup>

The PJC on ASIO, ASIS and DSD received over 150 written submissions in response to its inquiry and held public hearings in Canberra, Sydney and Melbourne.<sup>29</sup> The majority of the submissions called for the Bill to be abandoned or recommended key provisions be removed,<sup>30</sup> and much of the PJC ASIO, ASIS and DSD's oral hearings were devoted to exploring alternative policy options and additional safeguards for witnesses. A consensus report was

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<sup>26</sup> The regime is summarised in PJC on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) 3–5.

<sup>27</sup> For inquiry and report by 3 May 2002.

<sup>28</sup> As it transpired, an extension of time was eventually granted to both committees, with the PJC ASIO reporting on the ASIO Bill on 5 June 2002 and the LCA Legislation Committee tabling its report on 18 June 2002.

<sup>29</sup> Evidence was taken at public hearings in Canberra (30 April 2002), Sydney (1 May 2002) and Melbourne (2 May 2002). See PJC on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) 1.

<sup>30</sup> *Ibid.*

issued<sup>31</sup> that included strongly worded concerns about aspects of the Bill<sup>32</sup> and 15 recommendations for amendments, including that the Bill be amended to:

- ensure that persons detained under a Q&D warrant have access to legal representation, and be protected against self-incrimination;<sup>33</sup>
- require all warrants to be issued by a Federal Magistrate and, in those cases where detention will exceed 96 hours, by a Federal Court Judge;<sup>34</sup>
- prescribe a maximum period of detention of seven days, at the expiry of which a person will need to be charged or released;<sup>35</sup>
- provide that a person must have the right to judicial review after 24 hours of detention and every time a subsequent warrant is sought;<sup>36</sup>
- remove the power to detain a person under 18 under a questioning and detention warrant;<sup>37</sup> and
- include a three-year sunset clause for the questioning and detention regime.<sup>38</sup>

Of the 15 recommendations made by the PJC on ASIO, ASIS and DSD, 14 were accepted in part or in full, and government amendments were moved in the House to implement the legislative changes recommended by the committee.<sup>39</sup> As discussed below, these amendments

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<sup>31</sup> This report focused on matters including: the status of the prescribed authority responsible for issuing the Q&D warrants; access to legal representation for those subject to the proposed warrants; the maximum duration of the detention period permissible under the proposed warrants; the need for protocols governing the detention of persons subject to a proposed warrant; the application of the Bill to persons under 18; how to deal with the privilege against self-incrimination; whether the issue of a warrant should be subject to judicial review; and oversight and accountability measures. For an overview of the key issues see *ibid* 10.

<sup>32</sup> For example, the PJC ASIO observed that ‘The ASIO Terrorism Bill is the most controversial piece of legislation ever reviewed by the Committee’: *ibid* 1.

<sup>33</sup> *Ibid* Recommendation 6. A particular framework was recommended involving a panel of senior lawyers recommended by the Law Council of Australia who could represent persons being held in detention.

<sup>34</sup> *Ibid* Recommendation 1.

<sup>35</sup> *Ibid* Recommendation 3.

<sup>36</sup> *Ibid* Recommendation 15.

<sup>37</sup> *Ibid* Recommendation 10.

<sup>38</sup> *Ibid* Recommendation 12.

<sup>39</sup> These amendments were attributed to the work of the Parliamentary Joint Committee on ASIO, ASIS and DSD in the Supplementary Explanatory Memorandum. See Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth), which explained that the government



successfully passed through the House, but the ASIO Bill 2002 was blocked by members of the opposition and the minor parties in the Senate, who pushed hard for further changes to be made to the Bill, including amendments to preclude the application of the regime to children and the inclusion of a sunset clause.<sup>40</sup>

The legislative changes attributed to the PJC on ASIO, ASIS and DSD were substantive and rights-enhancing in character, even if they failed to remedy the most pressing of the human rights concerns with the Bill. As former committee member ALP Senator Robert Ray observed:

The ASIO 2002 Bills were the perfect example of the [PJC on ASIO, ASIS and DSD] issuing a consensus report recommending changes to a whole raft of provisions that were absolutely over the top and draconian ....

At this time, rights issues were very much in the minds of the committee.

The more intrusive powers, the more protections are required. In the first form of the legislation, there certainly wasn't anywhere enough of these.<sup>41</sup>

The LCA Legislation Committee's concurrent inquiry into the ASIO Bill 2002 was far less comprehensive and reflected an early deference by the LCA Legislation Committee to the more specialist PJC on ASIO, ASIS and DSD, which has intensified in more recent parliamentary inquiries into counter-terrorism law.<sup>42</sup> The LCA Legislation Committee did not hold any public

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amendments to the Bill will clarify: that a person who has previously been a Judge of a federal or state superior court may act as either an issuing authority, a prescribed authority or both (Items 2, 3, 4, 5, 6, 7, 8, 13 and 16); the Inspector-General of Intelligence and Security may be present at the questioning, taking into custody or detention of a person under a warrant (Items 19 and 20); that a person subject to a warrant will have access to an interpreter (Item 18); and that the Bill does not affect the law relating to legal professional privilege (Item 27). The government did not fully accept the Parliamentary Joint Committee on ASIO, ASIS and DSD's recommendations relating to complete access to legal representation during detention, questioning and detention of children, and a proposed three-year sunset clause; however, amendments were introduced that went some way towards meeting some of the committee's concerns about the first two issues: see Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth), Items 23–4.

<sup>40</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2002 (Robert McClelland) 6696; Commonwealth, *Parliamentary Debates*, Senate, 17 October 2002 (Kerry Nettle) 5385.

<sup>41</sup> Interview with Robert Ray, former Australian Labor Party Senator for Victoria (telephone, 23 November 2016).

<sup>42</sup> This is clear from the opening paragraphs of the LCA Committee's report: 'The reference of the same Bill simultaneously to both Committees placed this Committee in a somewhat difficult position. On one hand, the Committee has an obligation to report to the Senate on the matter. On the other hand, the Committee recognises the inherent difficulties involved in two Committees investigating the same matter or one Committee commenting on another Committee's current work. The Committee recognises that the two Committees have different roles. In matters concerning security operations, particularly relating to the security and intelligence organisations such as ASIO, inquiries are most appropriately undertaken by the PJC. On legal and constitutional matters contained in legislation, consideration of which is this Committee's role, the Committee has noted the attention given to

hearings or make any specific recommendations in its report on the Bill. Instead, it focused on the constitutional concerns raised with respect to the ASIO Bill 2002 by submission makers to both the PJC on ASIO, ASIS and DSD inquiry and the earlier LCA Committee inquiry into the SLAT Bills.<sup>43</sup> Having considered further advice from the AGD on these issues,<sup>44</sup> the majority of the LCA Legislation Committee concluded that, if adopted, the recommendations of the PJC ASIO would largely address all of the constitutional concerns raised by submission makers with respect to the Bill.<sup>45</sup>

The SSCSB also scrutinised the ASIO Bill 2002, first through its Alert Digest<sup>46</sup> and later in its report on the Bill.<sup>47</sup> In the Alert Digest, the SSCSB raised a number of concerns and questioned the necessity of the proposed new warrant regime, and whether it was appropriate that police powers should be extended to organisations concerned with the collection of intelligence.<sup>48</sup> Ensuring due process rights for those subject to the proposed new warrants was a central issue for the SSCSB, which observed that:

The protection of the community from terrorism is obviously a vital concern. However a community that fails to accord its citizens due process, and to protect their rights, even in

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those issues by the PJC. The Committee took a conscious decision that it would not adjudicate on the PJC's report. However, the Committee has a number of additional observations that it wishes to make.' LCA Legislation Committee, Parliament of Australia, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 1.

<sup>43</sup> The two key constitutional issues of interest to the LCA Committee were (1) 'the constitutionality of the Executive authorising the detention of a person who is not a suspect'; and (2) 'whether the issuing by magistrates of warrants for questioning of an individual is an exercise of executive power that is incompatible with their role'. Ibid 2.

<sup>44</sup> Ibid 2–3.

<sup>45</sup> In reaching this conclusion, the majority of the LCA Committee underscored the extraordinary nature of the powers proposed in the ASIO Bill 2002, but remained of the view that, if the recommendations of the PJC ASIO, ASIS and DSD were accepted, the Bill should pass. Ibid 4–5. A dissenting report was provided by Australian Democrats who opposed the Bill and described it as eroding key legal rights, undermining civil liberties and 'deeply flawed'. Ibid 9–11. A further dissenting report was provided by Labor Senator Barney Cooney and Australian Greens Senator Bob Brown, who observed that the Bill 'marks a sharp fall in the quality of our civil life and of our democratic system'. Ibid 11–12.

<sup>46</sup> SSCSB, Parliament of Australia, *Alert Digest No 4 of 2002* (15 May 2002).

<sup>47</sup> SSCSB, Parliament of Australia, *Report No 12 of 2002* (2002).

<sup>48</sup> SSCSB, Parliament of Australia, *Alert Digest No 4 of 2002* (15 May 2002).

extreme circumstances, runs the risk of becoming a community different in nature from that which currently exists.<sup>49</sup>

On 24 September 2002, the Attorney-General provided a written response to the questions raised by the SSCSB in its Alert Digest,<sup>50</sup> referring repeatedly to the government amendments moved in response to the PJC on ASIO, ASIS and DSD which, he asserted, alleviated the SSCSB's concerns.<sup>51</sup> In its final report on the ASIO Bill 2002, the SSCSB concluded that 'the provisions, even after amendment, may continue to be seen to trespass unduly on personal rights and liberties' and found that the 'Senate must therefore decide whether such breaches are acceptable when weighed against the policy objectives of the bill'.<sup>52</sup>

As noted above, while nearly all of the recommendations made by the PJC on ASIO, ASIS and DSD were reflected in government amendments to the ASIO Bill 2002 that passed the House, the amended Bill was not agreed to in the Senate. Instead, the Senate referred the ASIO Bill 2002 and related matters to the LCA References Committee for inquiry.<sup>53</sup> This time, led by a non-government majority, the LCA References Committee conducted an extensive public inquiry into the ASIO Bill 2002 that attracted over 400 written submissions and involved public hearings in Canberra, Melbourne and Sydney.<sup>54</sup>

Almost all of the submissions received by the LCA References Committee objected to parts or all of the Bill.<sup>55</sup> Like the SSCSB, the LCA References Committee queried whether it was

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<sup>49</sup> SSCSB, Parliament of Australia, *Report No 12 of 2002* (2002) 415, quoting from SSCSB, Parliament of Australia, *Alert Digest No 4 of 2002* (15 May 2002).

<sup>50</sup> On 13 August 2002, the Attorney-General wrote to the Acting Chair of the SSCSB to notify the committee of his intention to respond to the issues raised in the Alert Digest once the government's response to the reports of the other parliamentary committees that had inquired into the Bill was finalised. See SSCSB, Parliament of Australia, *Report No 12 of 2002* (2002) 415.

<sup>51</sup> See, eg, *ibid* 418.

<sup>52</sup> *Ibid*.

<sup>53</sup> LCA References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) ix. The terms of reference for the inquiry included consideration of the Labor Opposition's alternative model for questioning, wherein the Australian Federal Police rather than ASIO would have powers to coercively question, and the Australian Greens' reference to the human rights implications of the Bill and any proposed alternatives.

<sup>54</sup> *Ibid* xx.

<sup>55</sup> The proposed detention provisions provoked the most critical comment, in particular the idea that a person who is not suspected of having committed an offence being detained incommunicado for questioning and held without charge for up to a week, which was seen as incompatible with 'the rights and freedoms enjoyed in this country'. *Ibid* xix.

appropriate to invest an intelligence agency with coercive questioning and detention powers.<sup>56</sup> However the majority of the LCA References Committee supported the passage of the Q&D regime, albeit with some significant changes.<sup>57</sup> The committee made 27 recommendations for amendments to the ASIO Bill 2002, some of which included additional comments or provisos expressed by government members.<sup>58</sup> Among the key recommendations were that:

- changes be made to the way questioning and detention warrants are issued;<sup>59</sup>
- clear limits be set on the maximum time period for questioning;<sup>60</sup>
- a person subject to a warrant be given confidential access to lawyer of choice,<sup>61</sup> an interpreter,<sup>62</sup> and the IGIS during questioning;<sup>63</sup>
- procedures and protocols for detention under the proposed warrants be enshrined in regulation;<sup>64</sup>
- the proposed new regime be subject to a three-year sunset clause;<sup>65</sup> and
- the Bill not apply to children.<sup>66</sup>

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<sup>56</sup> See, eg, *ibid* 11–22. The LCA References Committee also considered: constitutional concerns raised with respect of the Bill (23–32); the ability for ASIO to detain people without charge for extended periods and deny them access to family members or legal representatives (71–90); the impact of the Bill on children, and the PJC on ASIO ASIS and DSD recommendation that the Bill not apply to people under 18 (129–36); the range of safeguards, protocols and oversight mechanisms recommended by the PJC on ASIO ASIS and DSD in its earlier report on the Bill (109–29); and possible alternative models of questioning people thought to have relevant information about terrorist activity or threats (91–109).

<sup>57</sup> This was a significant conclusion for the majority of the committee to reach, particularly in light of the fact that the non-government members of the LCA References Committee enjoyed a majority and in the context of senior Labor Opposition figures strongly calling for an alternative, AFP-based questioning approach.

<sup>58</sup> LCA References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) Recommendations 8 and 9.

<sup>59</sup> *Ibid* Recommendations 1–3.

<sup>60</sup> *Ibid* Recommendations 4–6.

<sup>61</sup> *Ibid* Recommendations 9, 11–14.

<sup>62</sup> *Ibid* Recommendations 17–18.

<sup>63</sup> *Ibid* Recommendation 20.

<sup>64</sup> *Ibid* Recommendations 22–3.

<sup>65</sup> *Ibid* Recommendation 26.

<sup>66</sup> *Ibid* Recommendation 27.

The majority of the committee concluded that these recommendations provided ‘a basis for improving and progressing the legislation, while keeping its provisions within acceptable bounds and respecting the rights and freedoms that are fundamental to the Australian community’.<sup>67</sup> A different view was adopted by the Australian Democrats<sup>68</sup> and Australian Greens<sup>69</sup> who concluded that, even with the changes proposed by the majority, the Bill was a ‘disproportionate, badly targeted and possibly unconstitutional response’ to the threat of terrorism in Australia.<sup>70</sup>

Following the tabling of the LCA References Committee report, the government introduced a range of amendments, implementing a number but not all of the LCA Committee’s recommendations.<sup>71</sup> Recommendations relating to the issuing authority for warrants were accepted, as were those relating to access to interpreters and the IGIS for those subject to a warrant.<sup>72</sup> The government amendments also sought to address concerns about lack of access to legal representation for those subject to a warrant, but did not fully implement the committee’s recommendations on this issue.<sup>73</sup> Nor did the government amendments restrict the

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<sup>67</sup> Ibid xxi.

<sup>68</sup> Ibid 153–4.

<sup>69</sup> Ibid 161–2.

<sup>70</sup> Ibid 161.

<sup>71</sup> For example, the government accepted the following LCA References Committee recommendations: Recommendations 1–3 (relating to issuing of warrants) via Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), Items 2–8, 13, 15 and 16; Recommendation 10 (relating to legal professional privilege) via Item 27; Recommendation 16 (relating to the right of persons subject to a questioning warrant to be informed of functions of all persons present) via Item 14; Recommendations 17–18 (relating to the right to request an interpreter) via Items 17, 18, 25; Recommendation 20 (relating to the right to access IGIS) via Items 19–20; Recommendation 21 (relating to conduct of searches) via Items 1, 22; Recommendations 22–23 (relating to procedures for detention) via Items 9–12; Recommendation 24 (relating to ASIO disciplinary procedures) via Item 26; and Recommendation 25 (relating to annual reporting requirements) via Item 28. It did *not* accept: Recommendations 4–6 (relating to the prescription of a maximum time period for questioning); Recommendations 7–8 (relating to limits on consecutive questioning warrants); Recommendation 15 (relating to the reverse onus of proof); Recommendation 26 (relating to a sunset clause of three years); and Recommendation 27 (that the Bill not apply to anyone under 18 years). In addition, the government did not accept the LCA Committee’s Recommendations 9, 11–14 relating to confidential access to lawyer of choice, however an alternative model to provide access to legal representation was proposed.

<sup>72</sup> See LCA References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) Recommendations 1–3 (relating to issuing of warrants), Recommendations 17–18 (relating to the right to request an interpreter) and Recommendation 20 (relating to the right to access IGIS).

<sup>73</sup> The government introduced an amendment to create a new proposed s 34AA. This responded in part to Recommendation 6 in the committee’s report on the Bill relating to access to legal representation by persons who are the subject of a warrant. See Revised Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), Item 24. Cf LCA References Committee,

proposed warrant regime to adults or introduce a three-year sunset clause. If this is where the legislative story ended, one would have to conclude that the LCA References Committee had only a modest legislative impact on the shape of the ASIO Bill 2002. However, the legislative story continued for some time, with the Bill debated deep into the night by both the House and the Senate during the final couple of sitting days in December 2002.<sup>74</sup> Chief among the issues debated during this period were whether a sunset clause should be included in the Bill and whether the regime should be restricted to adults, as recommended by both the LCA References Committee and the PJC on ASIO, ASIS and DSD. The need to ensure full, confidential access to legal representation and protect the common law privileges of self-incrimination and use immunity also featured strongly, particularly in the amendments moved by Opposition members. The Bill was not passed.

When Parliament resumed the next year, the ASIO Bill 2002 was re-introduced as the ASIO Bill 2003, which incorporated many of the features recommended by the committees discussed above.<sup>75</sup> For example, it included limits on the maximum time period for questioning under a warrant,<sup>76</sup> a process for a person subject to a warrant to access a lawyer of their choice (albeit a lawyer with a security clearance),<sup>77</sup> and a restriction to ensure that the questioning and detention regime only applies to people who are 14 years and older, and special regime for those between 14 and 18.<sup>78</sup> A three-year sunset clause for the proposed new regime was also included in the enacted Bill.

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Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) Recommendations 9, 11–14.

<sup>74</sup> On 12 December 2002 the Bill was the subject of an all-night sitting of Parliament. This was the last time for debate before the next sitting of Parliament on 4 February 2003.

<sup>75</sup> Interestingly, by this time, there was much broader agreement among major parties in the Parliament about the need for ASIO, rather than the AFP, to be able to exercise the proposed questioning and detention powers. The debate on the reintroduced Bill centred much more closely on the adequacy of the proposed safeguards in the Bill. For further discussion see Chapter 6.

<sup>76</sup> See ASIO Amendment (Terrorism) Bill 2003 Items 34C and 34D, implementing LCA References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) Recommendations 4–6.

<sup>77</sup> See ASIO Amendment (Terrorism) Bill 2003 Item 34A, adopting the same alternative model as that proposed in the government amendments to the 2002 Bill.

<sup>78</sup> See ASIO Amendment (Terrorism) Bill 2003 Item 34NA, partially adopting LCA References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) Recommendation 27.

The ASIO Bill 2002 and ASIO Act 2003 experience highlights how different components of the parliamentary committee system can work together to maximise the overall legislative impact of their scrutiny. Given the political dynamic of this period, and particularly the composition of the Senate, the legislative impact of parliamentary scrutiny on the shape of the enacted ASIO Act 2003 should not be overstated. Indeed, it may have been this political dynamic that provided the opportunity for the committees studied to exert particularly strong legislative influence on the content of the Bills. In any case, given the explicit acknowledgement of the work of the various parliamentary committees in multiple Supplementary Explanatory Memoranda and Hansard speeches<sup>79</sup> accompanying both government and opposition amendments, it is possible to conclude that parliamentary scrutiny of the ASIO Bills had an important rights-enhancing, but not rights-remedying, legislative impact.

*(c) Anti-Terrorism Act 2004 (CSA 4)*

The Anti-Terrorism Bill 2004 was introduced in May 2004, during the height of the public debate around the cases of David Hicks,<sup>80</sup> Mahmoud Habib<sup>81</sup> and the treatment of detainees by the US at Guantanamo Bay,<sup>82</sup> and six months prior to the 2004 federal election, after which the Howard Government had a majority in the Senate.<sup>83</sup> One of the key purposes of the Anti-

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<sup>79</sup> For an overview of the Hansard references to parliamentary committee work see Chapter 6.

<sup>80</sup> On 9 December 2001 Australian David Hicks was captured by the United States military, having been found among Taliban forces in Afghanistan. By January 2002, Hicks had been transferred to US military prison at Guantanamo Bay, Cuba. This marked the beginning of over a decade-long legal and diplomatic battle involving Australia, the US, the UK and Hicks' legal team. See Nigel Brew, Roy Jordan and Sue Harris-Rimmer, 'Australians in Guantanamo Bay: A Chronology of the Detention of Mamdouh Habib and David Hicks' (Chronologies Online, Parliamentary Library, Commonwealth, 2007); Joshua L Dratel, 'Navigating the New Military Commissions: The Case of David Hicks' (2006) 10 *New York City Law Review* 385; Lucas Bastin and Brian Tamberlin, 'David Hicks in the Australian Court: Past and Future Legal Issues' (2008) 82(11) *Australian Law Journal* 774.

<sup>81</sup> Mr Habib was an Egyptian and Australian citizen who was held for more than three years by the United States as an enemy combatant, and sent by extraordinary rendition from Pakistan to Egypt after his arrest. He was finally released without charges in January 2005. For further background see Brew, Jordan and Harris-Rimmer, above n 80; Cynthia Banham, 'The Power of Human Rights Rituals: Torture and the Australian Context' (2016) 22(1) *Australian Journal of Human Rights* 67.

<sup>82</sup> For further background see Brew, Jordan and Harris-Rimmer, above n 80.

<sup>83</sup> The Bill was also introduced in the shadow of the Madrid bombings, the Abu Ghraib scandal, the ul-Haque case and some of the first terrorism charges being laid in Australia. See, eg, *R v Ul-Haque* [2007] NSWSC 1251; Ross Ray, 'Policing in the Shadow of Australia's Anti-terror Laws' (2007) 366 *Lawyers Weekly* 20; Nicola Horsburgh and Fernando M Manas, 'Strengths and Weaknesses of Grassroots Jihadist Networks: the Madrid Bombings' (2008) 31(1) *Studies in Conflict and Terrorism* 17; Richard Neville, 'The Fever that Swept the West' (2009) 8(2) *Diplomat* 14; Katherine Gallagher, 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other

Terrorism Bill 2004 was to extend existing *Crimes Act 1915* (Cth) powers to enable AFP officers to detain people without charge for the purpose of investigating possible terrorist related activity (known as the Part IC changes).<sup>84</sup> The Bill also extended the existing proceeds of crime regime to ensure that it applied to proceeds derived from literary works.

The Bill was referred to the LCA Legislation Committee for inquiry and report, as well as being considered by the SSCSB.<sup>85</sup> After holding a 12-day inquiry, involving only a relatively small number of submissions and one public hearing,<sup>86</sup> the LCA Legislation Committee issued a report containing eight recommendations focused on:

- improving judicial oversight of the use of the proposed new Part IC powers;<sup>87</sup>
- ensuring clear criteria for proscription of organisations for foreign incursion laws;<sup>88</sup>
- tightening proposed proceeds of crime laws relating to literary proceeds and ensuring no retrospective operation;<sup>89</sup> and
- opposing recognition of military commissions in proceeds of crime laws.<sup>90</sup>

The government accepted the first two of these sets of recommendations and introduced amendments to that effect.<sup>91</sup> The government amendments also addressed the issue of retrospectivity<sup>92</sup> but otherwise rejected the remaining LCA Committee's recommendations.

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High-level United States Officials Accountable for Torture' (2009) 7(5) *Journal of International Criminal Justice* 1087; Martin Fraser, Jane Goodman-Delahunty, Melissa Martin and Diane Sivasubramaniam, 'Protecting Human Rights in Australian Investigative Interviews: the Role of Recording and Interview Duration Limits' (2014) 20(2) *Australian Journal of Human Rights* 107; Sarah Sorial, 'The Use and Abuse of Power and Why We Need a Bill of Rights: the ASIO (Terrorism) Amendment Act 2003 (Cth) and the Case of R v Ul-Haque' (2008) 34(2) *Monash University Law Review* 400.

<sup>84</sup> Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth), General Outline.

<sup>85</sup> LCA Legislation Committee, Parliament of Australia, *Inquiry into the Anti-Terrorism Bill 2004* (2004); Senate SSCSB, Parliament of Australia, *Alert Digest No 6 of 2004* (12 May 2004).

<sup>86</sup> The LCA Legislation Committee received 28 submissions: LCA Legislation Committee, Parliament of Australia, *Inquiry into the Anti-Terrorism Bill 2004* (2004) Appendix 1.

<sup>87</sup> Ibid 11–20, Recommendation 1.

<sup>88</sup> Ibid 23–32, Recommendations 2–4.

<sup>89</sup> Ibid 41–53, Recommendations 6–7.

<sup>90</sup> Ibid 48, Recommendation 8.

<sup>91</sup> Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Amendments (4), (5), (6), (7) and (8) implement LCA Committee Recommendations 1–4.

<sup>92</sup> Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Amendment 1.



The SSCSB report on the Bill focused exclusively on the Part IC changes that would permit law enforcement authorities to detain a person without charge, and without judicial oversight.<sup>93</sup>

While not directly attributed to the SSCSB, some of the successful government amendments improved the judicial oversight of the use of the Part IC provisions in line with the issues considered by the SSCSB.<sup>94</sup>

On this basis, is it possible to conclude that the formal parliamentary scrutiny of the Anti-Terrorism Bill 2004 had a rights-enhancing legislative impact on the Bill, in so far as it led to the introduction of additional safeguards and more precise, proscriptive criteria on the use of executive power. However, the central pillars of the reforms remained intact, including a new detention without charge regime, and more expansive proceeds of crime provisions.<sup>95</sup>

*(d) National Security Information (Criminal Proceedings) Bill 2004 (Cth)*

As noted in Chapter 3, 2004 also saw the introduction of a regime designed to protect classified national security information from being disclosed in federal criminal court proceedings,<sup>96</sup> loosely based on a similar regime implemented in the UK.<sup>97</sup> The regime proposed in the National Security Information (Criminal Proceedings) Bill 2004 sought to preclude the public, and the defendant, from accessing information that was relevant and sometimes critical to the prosecution case, where revealing that information could be considered prejudicial to national

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<sup>93</sup> SSCSB, Parliament of Australia, *Alert Digest No 6 of 2004* (21 June 2004) 5.

<sup>94</sup> See, eg, Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Amendments (4), (5), (6).

<sup>95</sup> Two additional amendments were made to the Bill following the issue of the LCA Legislation Committee report that detract from established criminal law principles and common law rights. These amendments remove the presumption against bail for people charged with terrorism offences and provide for minimum non-parole periods for persons convicted of, and sentenced to imprisonment for, terrorism offences. Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Item 1B and Item 1C.

<sup>96</sup> This Bill concerns ‘*federal criminal proceedings*’, which are defined in s 8 of the National Security Information (Criminal Proceedings) Bill 2004 as ‘a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth’.

<sup>97</sup> For further information about the UK approach see House of Commons Constitutional Affairs Committee, Parliament of the United Kingdom, *Constitutional Affairs – Seventh Report* (2005).

security.<sup>98</sup> It also proposed to introduce a system of security clearances for defence lawyers engaged in terrorism-related trials.<sup>99</sup>

Once passed by the House, the Bill was referred to the LCA Legislation Committee for inquiry and report.<sup>100</sup> During the inquiry, which attracted almost exclusively legal bodies and only modest numbers of submissions, the Attorney-General's Department and the Director of Public Prosecutions argued strongly in favour of changes, providing examples of the gaps in the pre-existing law in this area.<sup>101</sup> However, other submission makers queried the need for changes in light of other laws that they argued already provided for protection of sensitive information.<sup>102</sup>

The LCA Legislation Committee's report focused heavily on legal process rights, reflecting the predominantly legal character its key submission makers.<sup>103</sup> Legal organisations were particularly concerned about the proposed system of security clearances for lawyers, and the implications for the independence of the legal profession, particularly if security clearances

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<sup>98</sup> National Security Information (Criminal Proceedings) Bill 2004 (Cth) clauses 22–29. See also LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (12004) [2.23]–[2.42]. See also Jacob Varghese 'National Security Information (Criminal Proceedings) Bill 2004' (*Bills Digest No 25 2004–2005*, 9 August 2004) 4.

<sup>99</sup> National Security Information (Criminal Proceedings) Bill 2004 cl 34.

<sup>100</sup> The National Security Information (Criminal Proceedings) Bill 2004 (Cth) was introduced in Parliament on 27 May 2004. On 12 June 2004 it was referred to the Senate Legal and Constitutional Legislation Committee, which reported on 19 August 2004. LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004).

<sup>101</sup> Although a legal mechanism already existed to preclude the publication of information prejudicial to national security in court proceedings, known as 'public interest immunity', the government argued that this was a 'blunt' instrument to deal with national security information relevant to terrorist offending as, once evidence is excluded on public interest grounds, it cannot be used in any form to prove the guilt of the defendant. This became an obstacle in the case of *R v Lappas and Dowling* [2001] ACTSC 115, which the Attorney-General cited as a precipitant for the National Security Information (Criminal Proceedings) Bill 2004 (Cth). See Varghese, above n 988, 4.

<sup>102</sup> See, eg, Law Council of Australia, Submission No 8 to LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004) [3.5]–[3.8].

<sup>103</sup> For example, the report considered the implications of the Bill for the right to a fair and public trial, including the right to be tried in your own presence, to know the evidence supporting the conviction, and to prepare a defence including the right to call and question witnesses. LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004) ch 3.

were denied or delayed by the Attorney-General.<sup>104</sup> The LCA Legislation Committee made 13 recommendations including that:

- the court<sup>105</sup> retains its discretion to determine whether proceedings are open or closed;<sup>106</sup>
- the court be required to provide a written statement outlining the reasons for holding proceedings in-camera;<sup>107</sup>
- defendants and their legal representatives can only be excluded from hearings in limited specified circumstances;<sup>108</sup>
- the court be required, when making an order to exclude a witness from the proceedings, to be satisfied that the exclusion of the witness would not impair the ability of the defendant to make his or her defence;<sup>109</sup> and
- the court be required, when making an order for non-disclosure, to be satisfied that the redacted documentation to be adduced as evidence would provide the defendant with substantially the same ability to make his or her defence as would disclosure of the source document.<sup>110</sup>

The SSCSB also considered the Bill in a very short report focused on the weight to be attributed by the court exercising federal jurisdiction to the rights of the accused when considering

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<sup>104</sup> See, eg, Law Council of Australia, Submission No 8; Criminal Bar Association, Submission No 16; Human Rights and Equal Opportunity Commission, Submission No 14 to LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004) [3.99]–[3.120].

<sup>105</sup> In the *National Security Information (Criminal Proceedings) Bill 2004* (Cth) and related committee inquiry reports, ‘court’ refers to ‘court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth’: see *National Security Information (Criminal Proceedings) Act 2004* (Cth) s 8.

<sup>106</sup> LCA Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004) Recommendation 1.

<sup>107</sup> *Ibid* Recommendation 2.

<sup>108</sup> *Ibid* Recommendation 6.

<sup>109</sup> *Ibid* Recommendation 8.

<sup>110</sup> *Ibid* Recommendation 7.

whether to exclude national security information from the defendant.<sup>111</sup> The SSCSB also noted the lack of a requirement for the Attorney-General to provide reasons when issuing an evidential certificate under the Bill.<sup>112</sup>

Parliament was prorogued before the government issued its formal response to the LCA Legislation Committee's report. However, shortly after the Howard Government was re-elected, a new Bill was introduced that included a number of features recommended by the LCA Committee,<sup>113</sup> including: a narrower definition of 'national security';<sup>114</sup> a requirement to provide reasons for holding a hearing in camera;<sup>115</sup> power for the court to make decisions about how national security information could be used prior to trial;<sup>116</sup> and the preservation of the court's discretion to make decisions about the admissibility of evidence.<sup>117</sup> The new Bill also allowed the court to stay proceedings if the defendant could not be assured a fair trial, provided that a security-cleared lawyer could not be excluded from closed hearings, and ensured that defendants have the opportunity to make submissions before evidence or witnesses are excluded.<sup>118</sup> The new Bill also provided that 'substantial adverse effect' on the conduct of the defence must be a factor considered by the court in deciding to exclude evidence or witnesses or withdraw a statement or facts.<sup>119</sup>

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<sup>111</sup> SSCSB, Parliament of Australia, *Alert Digest No 11 of 2004* (11 October 2004) 29, 30.

<sup>112</sup> *Ibid* 31.

<sup>113</sup> These features were acknowledged as being included in response to the LCA Committee's recommendations in the Explanatory Memorandum accompanying the re-introduced Bill (which was re-introduced on 17 November 2004). See Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), 'General Outline'. See also Varghese, above n 98, 4.

<sup>114</sup> Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), Items 1–3.

<sup>115</sup> National Security Information (Criminal Proceedings) Bill 2004 (Cth) (reintroduced 17 November 2004) cl 32.

<sup>116</sup> *Ibid* cls 21–3.

<sup>117</sup> *Ibid* cl 31(7) (and deletion of previous sub-cl 29(6)).

<sup>118</sup> *Ibid* cl 29. This clause provides that security-cleared counsel cannot be excluded from closed hearings and defendants must have the opportunity to make submissions before evidence or witnesses are excluded. Cl 19 provides that courts retain the power to stay proceedings.

<sup>119</sup> *Ibid* cl 31(7).

These rights-enhancing features of the new Bill attributable to the work of the LCA Committee are particularly noteworthy coming after the Howard Government had been re-elected with an increased majority and with the prospect of a Senate majority in coming months.

*(e) The Control Orders Act (CSA 6)*

As noted in Chapter 3, the Control Orders Bill constituted one of the most significant legislative contributions to the counter-terrorism framework in Australia. Among other reforms, it introduced preventative detention orders, control orders and updated sedition offences into the federal criminal law.<sup>120</sup> The Bill was also exceptional in terms of the speed at which it moved through Parliament, enacted just 41 days after introduction,<sup>121</sup> despite attracting strong public attention and receiving second reading speeches by over 50 parliamentarians.<sup>122</sup>

When the Control Orders Bill was introduced into the House, it was referred immediately to the LCA Legislation Committee for inquiry and report.<sup>123</sup> After only 25 days, and having received nearly 300 submissions and hearing from 21 witnesses, the LCA Legislation Committee issued its report. The report contained 51 recommendations for change,<sup>124</sup> 17 of which related to the proposed preventative detention order regime, and sought to address the key concerns of submission makers.<sup>125</sup> Recommendations made by the LCA Committee to

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<sup>120</sup> For further background on the Control Orders Bill see Sue Harris-Rimmer et al, *Bills Digest Anti-Terrorism Bill (No 2)*, No 64 of 2005, 18 November 2005; Greg Carne, 'Prevent, Detain, Control and Order? Legislative process and executive outcomes in enacting the Anti-Terrorism Act (No 2) 2005 (Cth)' (2007) 10(1) *Flinders Journal of Law Reform* 17; Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: the Case for a Bill of Rights' (2007) 31(3) *Melbourne University Law Review* 1072; Murray McInnis, 'Anti-terrorism Legislation: Issues for the Courts' (2006) 51 *Australian Institute of Administrative Law Forum* 1; Bret Walker, *Independent National Security Legislation Monitor, Annual Report* (2011). For more recent commentary on the rights impact on the preventative detention order regime see Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tulich, T, Anaian-Welsh R, Bronitt S and Murray S (eds) *Regulating Preventative Justice: Principle, Policy and Paradox* (Routledge, 2017) 136.

<sup>121</sup> The Control Orders Bill was introduced on 3 November 2005 and received Royal Assent on 14 December 2005.

<sup>122</sup> Details of timing for parliamentary scrutiny and number of second reading speeches are provided in Chapter 6, Section B (timing) and Section C (parliamentary speeches).

<sup>123</sup> LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) [1.1].

<sup>124</sup> *Ibid* Recommendations [1.3]–[1.5].

<sup>125</sup> These concerns related to: the adequacy of the procedural safeguards within the proposed preventative detention order application and confirmation regime; access to the courts, including the right to judicial review; the conditions of detention and standards of treatment, including conditions governing detention of minors; the broad discretion to prohibit contact with the outside world, including contact between minors and their parents;

address these matters translated into over 30 successful amendments to the preventative detention order regime in the Bill that were directly attributed to the work of the committee in the Supplementary Explanatory Memorandum<sup>126</sup> and in the second reading speech of Senator Brandis, then representing the Attorney-General in the Senate.<sup>127</sup> The amendments included changes to how the preventative detention order regime would apply to children, including making express provision for children subject to a control order to have contact with their parents or other support persons.<sup>128</sup> The committee also made a number of recommendations for changes to the proposed control order regime, relating to the need to ensure access to natural justice and procedural fairness.<sup>129</sup> These recommendations also translated into successful government amendments that were attributed to the work of the LCA Committee and improved the procedural fairness of the control order regime, for example by requiring that the person subject to the interim order be provided with notice of an application for confirmation, and relevant information supporting that application.<sup>130</sup>

The LCA Committee also recommended that Schedule 7 (which contained proposed new sedition offences) be removed in its entirety and be subject to detailed consideration by the ALRC.<sup>131</sup> As an alternative, the majority recommended that significant changes be made to the proposed sedition-related offences.<sup>132</sup> While Schedule 7 was not removed from the Bill, the proposed sedition offences were amended to clarify the burden of proof and expand the proposed ‘good faith defence’ in the manner set out by the LCA Committee.<sup>133</sup> The government

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and the restrictions imposed on detainees’ lawyers and their discussions with their client. Ibid ch 3 (key issues summarised at [3.22]).

<sup>126</sup> Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), sch 4, Items 25–64.

<sup>127</sup> Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 18 (George Brandis).

<sup>128</sup> Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), Item 47.

<sup>129</sup> LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) ch 4. See also Recommendations 19–26.

<sup>130</sup> Anti-Terrorism Bill (No 2) 2005 cl 104.12A(2) and related amendments. Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), Item 13.

<sup>131</sup> LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) Recommendations 27 and 28, see also ch 5 ‘Sedition and Advocacy’.

<sup>132</sup> Ibid Recommendation 9, see also ch 5 ‘Sedition and Advocacy’.

<sup>133</sup> Anti-Terrorism Bill (No 2) 2005, Schedule of the amendments made by the Senate, Items 68–72 <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fsched%2F2469\\_sched\\_561025b0-3bc7-435a-b842-3d6cf44042bc%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fsched%2F2469_sched_561025b0-3bc7-435a-b842-3d6cf44042bc%22)>.

also adopted the LCA Committee's recommendation to refer the sedition offences to the ALRC for inquiry.<sup>134</sup>

Overall, in response to the LCA Committee's report, the government introduced 74 amendments to the Bill, the great majority of which could be described as 'rights-enhancing'. However, many of the LCA Committee recommendations were not implemented, or not implemented in full by the government,<sup>135</sup> although some of these recommendations were reflected in unsuccessful opposition amendments, such as setting out a process for independent review of the preventative detention order regime or introducing a five-year sunset clause.<sup>136</sup>

The SSCSB also reported on the Control Orders Bill,<sup>137</sup> focusing on the provisions of the Bill that sought to exclude judicial review,<sup>138</sup> the retrospective operation of certain key provisions, and the abrogation of common law privileges.<sup>139</sup> In its usual style, the SSCSB left these matters to the Senate as a whole to consider. While none of the government amendments to the Bill were directly attributed to the work of the SSCSB, the issues raised by the SSCSB featured prominently in the report of the LCA Committee,<sup>140</sup> which in turn led to a number of successful government amendments and had the effect of at least partially alleviating some of the concerns

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<sup>134</sup> ALRC, *Fighting Words: A review of sedition laws in Australia*, Report No 104 (2006). On 1 March 2006, the government issued formal Terms of Reference for an ALRC inquiry, which included consideration of whether the new offences in sch 7 of the Control Orders Bill 'effectively address the problem of urging the use of force or violence'.

<sup>135</sup> For example, the following recommendations were not implemented in full: LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) Recommendation 25: 'The committee recommends that the Bill be amended by inserting an express requirement for a public and independent 5 year review of the operation of Division 104, adopting the same mechanism and similar terms to that provided by s 4 of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), which established the Sheller Committee.' Recommendation 27: 'The committee recommends that Schedule 7 be removed from the Bill in its entirety.' Recommendation 39: 'The committee recommends that the Bill be amended by inserting an express requirement for a public and independent five year review of the operation of Schedule 5.'

<sup>136</sup> See, eg, Anti-Terrorism Bill (No 2) 2005, Schedule of the amendments moved by Senator Ludwig on behalf of the Opposition in Committee of the whole <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Famend%2F2469\\_amend\\_1b897e88-a64d-49c2-ae2c-40e66788818a%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Famend%2F2469_amend_1b897e88-a64d-49c2-ae2c-40e66788818a%22)>.

<sup>137</sup> SSCSB, Parliament of Australia, *Alert Digest No 13 of 2005* (9 November 2005) 8.

<sup>138</sup> For example, the committee focused on the provisions of the Bill that excluded the Attorney-General's decision to consent to a police officer requesting a CO or PDO from the scope of the ADJR Act. Ibid 8, 13.

<sup>139</sup> For example, the SSCSB discussed the Bill's impact on the common law privileges of self-incrimination and legal professional privilege in the context of proposed provisions requiring the production of documents. Ibid 8, 14–16.

<sup>140</sup> See, eg, LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 13–14, 24–7, 48, 143. See also Recommendations 2, 4, 7, 8, 13, 14.

raised by the SSCSB.<sup>141</sup> Interestingly, the PJCIS (as it was by now known) did not receive a reference to inquire into the Control Orders Bill, signalling that, at least at this time, the LCA Committee remained the ‘forum of choice’ for large-scale public inquiries into proposed new counter-terrorism laws.

Taken together, the Bills in this first phase demonstrate that, even where there is bipartisan support for strong legislative responses to new threats to Australia’s national security, parliamentary committees can have a rights-enhancing impact on the content of the laws passed. As discussed further in Chapter 6, this can occur even when the Bills are rushed through Parliament, and is greatly enhanced when more than one committee is involved in scrutinising or reviewing a proposed law. While the case study Acts enacted during this phase continue to raise serious rights concerns and have been cited by some scholars as evidence of the weaknesses of the parliamentary model of rights protection,<sup>142</sup> the rights implications of these laws would have been significantly worse had parliamentary committees not been able to effect significant legislative change. As the next phase reveals, the rights-enhancing impact of parliamentary committees can also have a longer-term effect, helping to shape the development of new provisions and providing the basis for further independent review of Australia’s counter-terrorism framework.

### *Phase 2: Consolidating Reform of Counter-Terrorism Laws*

The second ‘phase’ of parliamentary scrutiny of counter-terrorism law was a period covering 2008–2012, commencing with the defeat of the Howard Government and the election of the Rudd Government. As noted in Chapter 3, this period saw review and reform of pre-existing counter-terrorism laws and the introduction of new oversight mechanisms to help ‘strike the right balance’ between national security and individual rights and freedoms. This phase also saw the establishment of the PJCHR in response to the findings of the National Consultation.

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<sup>141</sup> See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth).

<sup>142</sup> See, eg, Greg Carne, ‘Re-Orientating Human Rights Meanings and Understandings? Reviving and Revisiting Australian Human Rights Exceptionalism through a Liberal Democratic Rights Agenda’ (2015) 17 *Flinders Law Review Journal* 1; George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35(3) *Melbourne University Law Review* 1136; Andrew Lynch, ‘Legislating with Urgency – The Enactment of the Anti-Terrorism Act (No 1) 2005’ (2006) 30(3) *Melbourne University Law Review* 747; Svetlana Tyulkina and George Williams, ‘Combating Terrorism in Australia through Preventative Detention Orders’ in Tullich, T, Anaian-Welsh R, Bronitt S and Murray S (eds) *Regulating Preventative Justice: Principle, Policy and Paradox* (Routledge, 2017) 136; Daniel Reynolds and George Williams, *A Charter of Rights for Australia* (NewSouth Books, 4th ed 2017).



This period also coincided with a number of specific cases that drew public attention to the scope of the new powers given to intelligence and law enforcement agencies, and the risks associated with the use of those powers, including the case of Dr Mohamed Haneef.<sup>143</sup>

Two Bills illustrate this phase of the legislative impact: the National Security Legislation Amendment Bill 2010 and the INSLM Bill 2010. Together these Bills constitute the most significant legislative activity in the area of counter-terrorism by the Rudd and Gillard Governments, and reflect many years of independent review of Australia's counter-terrorism framework introduced since 2001. These Bills are also different in character to the phase 1 Bills discussed above, as they were introduced in an effort to consolidate the existing counter-terrorism framework, rather than in response to an emerging threat to national security. As the below discussion reveals, although neither of these Bills were referred to the PJCIS following their introduction, the past work of the PJCIS featured strongly in their development. In this way, this phase marks the beginning of the rise of the PJCIS as a committee with significant influence on the shape of Australia's counter-terrorism laws.

*(a) The INSLM Act (CSA 7)*

As noted in Chapter 3, the INSLM Bill had its origins in past reviews of counter-terrorism legislation, including reviews conducted by the PJCIS in 2006 and 2007,<sup>144</sup> the Sheller Committee<sup>145</sup> and the Haneef Inquiry.<sup>146</sup> It also represented the culmination of previous efforts by Liberal backbenchers Humphries and Troeth to introduce similar legislation in 2008.<sup>147</sup> The PJCIS articulated the need for an independent monitor of counter-terrorism law in its 2006 report as follows:

The terrorism law regime is, essentially, a preventive model, which differs in many respects from our earlier legal traditions. Bearing in mind the significance of these changes and the

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<sup>143</sup> Mark John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef* (2008) (Haneef Report).

<sup>144</sup> PJCIS, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007) 52; PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) 21–2. See, eg, Explanatory Memorandum, National Security Legislation Monitor Bill 2009 (Cth) notes on cl 3.

<sup>145</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6 (Sheller Committee Report).

<sup>146</sup> Clarke, above n 143, 255–6.

<sup>147</sup> Independent Reviewer of Terrorism Laws Bill 2008 [No 2].

importance of terrorism policy into the future, we have recommended the appointment of an Independent Reviewer to provide comprehensive and ongoing oversight. The Independent Reviewer, if adopted, will provide valuable reporting to the Parliament and help to maintain public confidence in Australia's specialist terrorism laws.<sup>148</sup>

The purpose of the INSLM Bill was to establish the statutory position of the National Security Legislation Monitor to review:

the operation, effectiveness and implications of the counter-terrorism and national security legislation and report his or her comments, findings and recommendations to the Prime Minister. In addition, the Monitor must consider whether Australia's counter-terrorism and national security legislation contains appropriate safeguards for protecting individual rights, and whether the legislation remains necessary.<sup>149</sup>

Although previous incarnations of the Bill had been considered by the LCA Legislation Committee,<sup>150</sup> the 2010 INSLM Bill was reviewed by the Senate Finance and Public Administration Committee (SFPAC).<sup>151</sup> The SFPAC conducted a relatively small public inquiry and drew heavily from past scrutiny reports including the LCA Committee's inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 (No 2) (Cth)<sup>152</sup> and other inquiries into counter-terrorism laws that recommended the establishment of an INSLM. The SFPAC issued a consensus report that contained 12 recommendations for amendment but otherwise supported the Bill. These recommendations included: a name change (adding 'independent' to

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<sup>148</sup> PJCS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) vii.

<sup>149</sup> SFPAC, Parliament of Australia, *Inquiry into National Security Legislation Monitor Bill 2009* (2009) [1.5].

<sup>150</sup> For example, in October 2008, the LCA Legislation Committee reported on its inquiry into the Independent Reviewer of Terrorism Laws Bill 2008 (No 2). See LCA Legislation Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (2008).

<sup>151</sup> SFPAC, Parliament of Australia, *Inquiry into National Security Legislation Monitor Bill 2009* (2009). Senate, Parliament of Australia, *Standing Order 25* (15 July 2014) provides for the appointment of a legislative and general purpose standing committee on Finance and Public Administration. The SFPAC maintains oversight over two portfolios: Prime Minister and Cabinet and Finance (including Indigenous Affairs). The committee also maintains oversight over three parliamentary departments: the Department of the Senate, the Department of Parliamentary Services and the Parliamentary Budget Office. The SFPAC has membership structure and inquiry powers similar to that of the LCA Committees. Its Legislation Committee has a government Chair and government majority, while its Reference Committee has a non-government Chair and non-government majority.

<sup>152</sup> LCA Legislation Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (2008).

the Monitor's title),<sup>153</sup> power for the INSLM to conduct its own inquiries,<sup>154</sup> power for the PJCIS to refer matters to the INSLM for inquiry and report,<sup>155</sup> and providing the INSLM with an explicit mandate to assess whether the counter-terrorism laws were consistent with Australia's international human rights obligations.<sup>156</sup> The government implemented all of these recommendations as amendments to the Bill.<sup>157</sup> In addition, the key features of the INSLM Bill were drawn from provisions already considered by the LCA Committee in its inquiries into the previous incarnations of the Bill.<sup>158</sup> Thus, it is possible to conclude that, in this case, the parliamentary committee system had a substantial legislative impact on the enacted law. As ALP Senator Ludwig observed during the second reading debate on the INSLM Bill:

In many respects, the bill we are considering today reflects the considerable work of both the joint and the Senate committees in drawing attention to and developing proposals to fix a gap in the security legislation identified by both committees, as well as independent reviews of counterterrorism legislation since 2001. I recognise the work of my Senate and House colleagues from all parties on this important issue. To a great extent the bill is the fruit of a properly functioning parliament working at its best.<sup>159</sup>

As will be discussed further below, the work of the INSLM has had a significant and predominantly rights-enhancing impact on the shape of subsequent changes to Australia's counter-terrorism laws, despite the Abbott Government's attempts to abolish the office, delays in appointing or re-appointing an INSLM, and delays in government responses to successive

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<sup>153</sup> SFPAC, Parliament of Australia, *Inquiry into National Security Legislation Monitor Bill 2009* (2009) Recommendation 2.

<sup>154</sup> Ibid Recommendation 5.

<sup>155</sup> Ibid Recommendation 6.

<sup>156</sup> Ibid Recommendation 10. See also Recommendations 9 and 11. Additional comments were provided by the Liberal Senators who queried the location of the Monitor within the Department of Prime Minister and Cabinet, noting that it 'may have an adverse impact on the independent nature of the Monitor': at 43. The Australian Greens also made a number of additional suggestions for amendments: see National Security Legislation Monitor Bill 2009 (Cth), Amendments to be moved by Senator Ludlam on behalf of the Australian Greens in committee of the whole.

<sup>157</sup> These amendments were attributed to the work of the SFPAC in the second reading speeches accompanying the Bill and in the Supplementary Explanatory Memorandum accompanying the amendments. See Supplementary Explanatory Memorandum, National Security Legislation Monitor Bill 2009 (Cth).

<sup>158</sup> LCA Legislation Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (2008).

<sup>159</sup> Commonwealth, *Parliamentary Debates*, Senate, 3 February 2010, 209 (Joseph Ludwig, Special Minister for State).

INSLM reports. The value of the INSLM was also emphasised in interviews conducted for this thesis. For example, Law Council of Australia Criminal Law Committee member Mr Phillip Boulten SC said:

The Monitor's work is really important. ... The Monitor acts over and above politics. Both of [the appointed Monitors] have been very diligent and effective in the way in which they conduct their inquiries. They engaged with the Law Council and other contributing bodies in a very thorough and open-minded way. Their reports go past immediate use value. In many respects, they're the real conscience of both the PJCIS and the Parliament on these issues.<sup>160</sup>

*(b) National Security Legislation Amendment Act 2010 (Cth) (CSA 8)*

The National Security Legislation Amendment Bill 2010 (Cth) is another example of a Bill introduced in response to a series of independent reviews of Australia's counter-terrorism provisions introduced since 2002.<sup>161</sup> As noted in Chapter 3, the National Security Legislation Amendment Bill 2010 (Cth) was preceded by a discussion paper<sup>162</sup> circulated by the Attorney-General's Department in August 2009.<sup>163</sup> Some, but not all, of the proposals contained in the discussion paper were included in the Bill. The changes proposed in the Bill included amendments to the treason and sedition offences, changes to the 'dead time' provisions in Part IC of the *Crimes Act 1914* (Cth),<sup>164</sup> changes to the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)<sup>165</sup> and expanded oversight

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<sup>160</sup> Interview with Phillip Boulten SC, Criminal Law Committee Member, Law Council of Australia (Sydney, 31 May 2016).

<sup>161</sup> These reviews included Clarke, above n 146; PJCIS, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (Cth) (2007) 52; PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) 21–2; Sheller Committee Report, above n 145, 6.

<sup>162</sup> See Hon Robert McClelland MP, Attorney-General, 'National Security Legislation Discussion Paper' (Media Release, 12 August 2009). See also LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) [1.2].

<sup>163</sup> In his second reading speech on the Bill, the then Attorney-General said that the 'Government has taken into account some valuable suggestions made by those who provided feedback on the proposals'. Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2010, 3 (Robert McClelland, Attorney-General).

<sup>164</sup> National Security Legislation Amendment Bill 2010 (Cth) sch 3, Item 16. This included setting a maximum seven-day limit on the amount of time that can be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence.

<sup>165</sup> *Ibid* sch 8.

powers for the IGIS.<sup>166</sup> The discussion paper and the Bill formed part of an attempt by the Rudd Government to ensure that Australia's counter-terrorism laws strike:

a balance between the Government's responsibility to protect Australia, its people and its interests, and instilling confidence in the community that the national security and counter-terrorism laws will be exercised in an accountable way, protecting key civil liberties and the rule of law.<sup>167</sup>

Following its introduction, the National Security Legislation Amendment Bill 2010 (Cth) was referred to the LCA Legislation Committee for inquiry and report.<sup>168</sup> The committee received 23 submissions, largely from legal organisations, law reform bodies, government departments and law enforcement agencies and held a public hearing in Melbourne. A number of submission makers expressed concern that the issues they raised in submissions in response to the discussion paper were not addressed in the Bill.<sup>169</sup> These included concerns about the proposed new 'urging violence' offences,<sup>170</sup> the pre-charge detention provisions in Part IC of the *Crimes Act 1915* (Cth),<sup>171</sup> and the system of security-cleared lawyers under the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth).<sup>172</sup> Some submission makers also expressed concern that the Bill did not make substantive changes to the existing control orders and preventative detention order regimes, and proposed only relatively minor changes to the proscription regime and terrorist organisation offences.<sup>173</sup>

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<sup>166</sup> Ibid sch 9.

<sup>167</sup> Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 2.

<sup>168</sup> On 18 March 2010 the Senate jointly referred the National Security Legislation Amendment Bill 2010 and the Parliamentary Joint Committee on Law Enforcement Bill 2010 for inquiry and report. LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) [1.1].

<sup>169</sup> See, eg, Castan Centre for Human Rights Law, Monash University, Submission No 9; Gilbert & Tobin Centre of Public Law, Submission No 10; National Association of Community Legal Centres, Submission No 13; Civil Liberties Australia, Submission No 14; Law Council of Australia, Submission No 22 to LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

<sup>170</sup> LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) [3.22]–[3.62].

<sup>171</sup> Ibid [3.76]–[3.128]

<sup>172</sup> Ibid [3.129]–[3.136].

<sup>173</sup> See, eg, Castan Centre for Human Rights Law, Monash University, Submission No 9; Gilbert & Tobin Centre of Public Law, Submission No 10; National Association of Community Legal Centres, Submission No 13; Civil Liberties Australia, Submission No 14; Law Council of Australia, Submission No 22 to LCA Legislation

The majority of the LCA Legislation Committee recommended four amendments, including that the government reissue the Explanatory Memorandum to clarify the reasons for introducing the proposed new ‘urging violence’ offences and remove the element of ‘good faith’ from the proposed defence to the new offences.<sup>174</sup> It also recommended that the ALRC conduct a public inquiry into the pre-charge detention regime in Part IC of the *Crimes Act 1915* (Cth)<sup>175</sup> and amend the regime to limit the amount of time that a person can be held in detention to a maximum of three days.<sup>176</sup> The Liberal Senators of the LCA Legislation Committee did not agree with this last recommendation, preferring evidence given by law enforcement officers that a maximum of seven days pre-charge detention was more appropriate.<sup>177</sup> A dissenting report was provided by the Australian Greens, who argued that the legislation should not proceed until reviewed by the newly created position of INSLM.<sup>178</sup>

The SSCSB also considered the Bill,<sup>179</sup> focusing its attention on the commencement of the new treason-related offences.<sup>180</sup> The SSCSB expressed concern about the proposed reversal of proof to apply to these new offences where the conduct is undertaken for the purposes of humanitarian assistance.<sup>181</sup>

The original Bill lapsed with the proroguing of Parliament on 28 September 2010 without any amendments being introduced. An identical Bill was then reintroduced, with only minor changes to the Explanatory Memorandum, and without any substantive changes to address the LCA Legislation Committee’s recommendations. At first blush, this would suggest that formal parliamentary scrutiny of the Bill had no discernible legislative impact at all. However, this

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Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (17 June 2010).

<sup>174</sup> LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) Recommendations 1 and 2.

<sup>175</sup> Ibid Recommendation 3.

<sup>176</sup> Ibid Recommendation 4.

<sup>177</sup> See ibid ‘Additional Comments by Liberal Senators’.

<sup>178</sup> See ibid ‘Dissenting Report by Australian Greens’.

<sup>179</sup> SSCSB, Parliament of Australia, *Alert Digest No 5 of 2010* (12 May 2010); SSCSB, Parliament of Australia *Report 7 of 2010* (2010) 267.

<sup>180</sup> SSCSB, Parliament of Australia, *Report 7 of 2010* (2010) 267, 268–70.

<sup>181</sup> Ibid 270–1. However, once further information was received from the Attorney-General, the SSCSB considered that its concerns in this area had been adequately addressed.

would obscure the strong influence of the previous recommendations made by the PJCIS in its 2007 and 2006 inquiries, which featured strongly in both the discussion paper and in the Explanatory Memorandum accompanying the Bill. In fact, many of the key features of the Bill reflected the government's attempt to implement the outstanding recommendations of the PJCIS and were attributed as such in both the Explanatory Memorandum and in the second reading speeches on the Bill. For example the following rights-enhancing features of the Bill were attributed to previous recommendations made by the PJCIS:

- changes to clarify the content and narrow the scope of the treason offences;<sup>182</sup>
- changes to the time frames relating to the proscription of terrorist organisations, to provide improved opportunities for organisations subject to proscription orders to challenge their proscription;<sup>183</sup>
- changes to ensure parliamentary oversight over the proscription process by continuing to require the PJCIS to review regulations that prescribe terrorist organisations;<sup>184</sup> and
- changes to the listing process for the proscription of terrorist organisations relating to UN instruments, to narrow the scope of 'automatic' listing provisions.<sup>185</sup>

Taken together, the two Bills in this phase of scrutiny provide examples of the legislative impact of the *system* of parliamentary committees, demonstrating that, even when a particular committee struggles to have its recommendations translated into legislative change, the cumulative effect of past committee inquiries and reports can be significant and rights-enhancing. This phase also points to the cumulative rights-enhancing effect of multiple stages of rights review, whether from parliamentary committees or other independent review bodies, which increasingly features the PJCIS as a key player. As discussed below, this theme continued in phase 3.

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<sup>182</sup> Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) Item 15.

<sup>183</sup> Ibid Item 3.

<sup>184</sup> Ibid Item 4.

<sup>185</sup> Ibid Item 1.

### *Phase 3: The Rise of the PJCIS and the Introduction of the PJCHR*

Phase 3 of parliamentary scrutiny of counter-terrorism law commenced at the election of the Abbott Government in 2013 and continued up until the end of 2015, taking in ‘tranche 5’ of the counter-terrorism law-making experience described in Chapter 3 and incorporating the following case study Acts:

- Data Retention Act (CSA 9);
- *Counter-Terrorism Legislation Amendment Act (No 1) 2014* (Cth) (CSA 10);
- Foreign Fighters Act (CSA 11);
- Citizenship Act (CSA 12).

In this phase it is possible to see two distinct trends occurring. The first is the complete sidelining of the LCA Committees as a forum for inquiring into proposed changes to counter-terrorism laws. The second is the 100 per cent ‘strike rate’ of the PJCIS in translating its recommendations for legislative change into successful amendments.<sup>186</sup> This dramatic rise in legislative impact attributable to the PJCIS occurred against the backdrop of the newly operational INSLM and the now functioning PJCHR, and generates important insights for the discussion in Part III of my research.

#### *(a) The Data Retention Act (CSA 10)*

The Data Retention Bill provides a useful case study to examine the longer-term legislative impact of the PJCIS, and the role of the LCA Committees in providing a forum for extensive public debate on bold new legislative reforms. The Bill, which was introduced by the Abbott Government, had its origins in a proposal first floated by the Gillard Government in a discussion paper developed by the then Attorney-General the Hon Nicola Roxon MP in May 2012.<sup>187</sup> The Roxon discussion paper was referred to the PJCIS for inquiry and report, in what

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<sup>186</sup> This is clear from the Explanatory Memoranda and second reading speeches accompanying each of the Bills discussed below, and also from the PJCIS’s annual reports. PJCIS, Parliament of Australia, *Annual Report of Committee Activities 2014–2015* (2015) 3. The PJCIS’s 2014–2015 annual report suggests that, across the four counter-terrorism Bills reviewed in this period, it made 109 recommendations for change, all of which were accepted by the government, and resulted in 63 successful amendments to the relevant Bills.

<sup>187</sup> The package of reforms included ‘telecommunications interception reform, telecommunications sector security reform and Australian intelligence community reform’, and drew upon findings and recommendations made in



became known as the Inquiry into the Potential Reforms of Australian's National Security Legislation.<sup>188</sup> The inquiry lasted for just over a year and attracted 236 written submissions. Five public hearings were held in Sydney, Melbourne and Canberra.<sup>189</sup> The PJCIS tabled its report in June 2013 making 43 recommendations,<sup>190</sup> three directly related to data retention.<sup>191</sup> One of these recommendations suggested that, if such a regime was to be pursued, draft legislation should be developed and released for public consultation, and should include a range of specific features.<sup>192</sup> Another said that, if a mandatory data retention regime was pursued, the PJCIS should have a clear oversight role and review the regime within three years.<sup>193</sup> These became critical considerations in the PJCIS's subsequent inquiry into the Data Retention Bill.

Some months after the PJCIS had issued its report, and following the election of the Abbott Government in 2013, the newly constituted Senate asked the non-government majority LCA References Committee to undertake a 'comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (Cth)'.<sup>194</sup> The LCA References Committee was asked to have particular regard to recent recommendations made by the ALRC, and the

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previous inquiries and reports, including ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (May 2008), particularly Recommendation 71.2. See also PJCIS, Parliament of Australia, *Inquiry into the potential reforms of Australia's National Security Legislation* (2013) [1.2].

<sup>188</sup> PJCIS, Parliament of Australia, *Inquiry into the potential reforms of Australia's National Security Legislation* (2013) xii–xix.

<sup>189</sup> During that time, the PJCIS received evidence highlighting the need for urgent and comprehensive reform of the *Telecommunications (Interception and Access) Act 1979* (Cth) including strong opposition to the mandatory data retention proposal. The PJCIS, along with many submission makers, also expressed frustration at the lack of detailed provided in the discussion paper and the scope of the reforms to be considered. Ibid [1.15]–[1.16]. The Attorney-General's response was published on the PJCIS's website <[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=pjcis/ns12012/index.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=pjcis/ns12012/index.htm)>. See also ibid Appendix F.

<sup>190</sup> PJCIS, *Inquiry into the potential reforms of Australia's National Security Legislation* (2013) Recommendations 1–18 related to the *Telecommunications (Interception and Access) Act 1979* (Cth) and Recommendations 42 and 43 concerned data retention.

<sup>191</sup> Ibid Recommendations 5, 42 and 43.

<sup>192</sup> Ibid Recommendation 42. These features included that any mandatory data retention regime should apply only to meta-data and exclude content, that data retained under a new regime should be for no more than two years, and that the regime should include a robust, mandatory data breach notification scheme, and oversight of agencies' access to telecommunications data by the Ombudsman and the IGIS.

<sup>193</sup> Ibid Recommendation 43.

<sup>194</sup> LCA References Committee, Parliament of Australia, *Comprehensive revision of Telecommunications (Interception and Access) Act 1979* (2015).

recommendations of the PJCIS inquiry described above.<sup>195</sup> The LCA References Committee received 46 submissions and held six public hearings.<sup>196</sup> The inquiry was lengthy, with a final report not issued until 23 March 2015. During that time, the LCA References Committee received substantial comment on the issue of mandatory data retention and by the later stages of the committee's inquiry the government had announced that it would be introducing the Data Retention Bill.<sup>197</sup>

The LCA References Committee Chair, Australian Greens Senator Scott Ludlam, and the other committee members could not reach agreement on the key issues raised during the inquiry. As a result, the final report includes a lengthy Chair's report, containing six recommendations, including that the Data Retention Bill be withdrawn.<sup>198</sup> The government Senators opposed the Chair's report and instead recommended that the *Telecommunications (Interception and Access) Act 1979* (Cth) be amended to provide a single attribute-based warrant scheme to apply to telecommunications content and that the Data Retention Bill be passed by the Senate.<sup>199</sup>

Meanwhile, on 21 November 2014, the Data Retention Bill was referred to the PJCIS for inquiry and report.<sup>200</sup> Attorney-General Brandis also provided the PJCIS with a draft data set outlining the specific types of telecommunications data that service providers would be required to retain.<sup>201</sup> The Explanatory Memorandum accompanying the Bill included numerous

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<sup>195</sup> Ibid; see also ALRC, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (May 2008) particularly recommendation 71.2

<sup>196</sup> Public hearings were held in Canberra and Sydney during April and July 2014 and February 2015.

<sup>197</sup> On 30 October 2014, the Minister for Communications, the Hon Malcolm Turnbull MP, introduced the Data Retention Bill into the House of Representatives.

<sup>198</sup> The Chair's report also recommended that, if the Data Retention Bill was not withdrawn, a number of changes be made, including that telecommunications 'data' be defined in the Bill and that data only be accessed via a warrant. See 'Chair's Minority Additional Comments' in LCA References Committee, Parliament of Australia, *Comprehensive revision of Telecommunications (Interception and Access) Act 1979* (2015).

<sup>199</sup> Labor Senators also provided additional comments but did not make specific recommendations, other than to reiterate the recommendations made by the PJCIS in its 2013 inquiry, and to urge the government to respond to community concerns with the proposed mandatory data retention scheme. 'Comments from Opposition Senators' in LCA References Committee, Parliament of Australia, *Comprehensive revision of Telecommunications (Interception and Access) Act 1979* (2015).

<sup>200</sup> See PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015).

<sup>201</sup> Ibid [1.14]–[1.15].

references to the 2013 PJCIS inquiry and described some provisions of the Bill as implementing the relevant PJCIS recommendations.<sup>202</sup>

In response to its Data Retention Bill inquiry, the PJCIS received 204 submissions and held three public hearings over December and January 2015.<sup>203</sup> The PJCIS's consensus report was tabled on 27 February 2015 (almost a month before the tabling of the LCA References Committee's report). It looked carefully at the matters set out in the PJCIS's 2013 report and noted the failure of the government to provide the PJCIS with draft legislation to consider prior to introducing the Bill into Parliament.<sup>204</sup> The PJCIS's report also referred extensively to the work of other parliamentary committees and independent reviews, including the LCA References Committee, the SSCSB and the PJCHR.<sup>205</sup> Consideration was also given to the relevant human rights standards, particular the right to privacy protected by Article 17 of the ICCPR,<sup>206</sup> and to the way these issues were dealt with by the government in the SoC accompanying the Bill. Particularly strong concerns were raised by media groups about the impact of the regime on journalists and their sources, and on their ability to report on matters

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<sup>202</sup> Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, Items 6–7.

<sup>203</sup> The PJCIS also held one private hearing and received three private briefings from relevant agencies in Canberra, and visited the Australian Federal Police headquarters for further operational briefings. PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) [1.18].

<sup>204</sup> Ibid. Detailed consideration, and significant media attention, was also given to what would fall within the 'data set' to be retained under the regime. For an overview see Nigel Brew, 'Telecommunications data retention – an overview' (Background Note Parliamentary Library, Parliament of Australia, 2012). See also discussion in Chapter 6, Section D. The PJCIS report also considered the appropriate period to retain data (PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) ch 4), which agencies should have access to stored communications and telecommunications data (ch 4), and what safeguards and oversight mechanisms should apply (ch 4 particularly 144–8; ch 6 particularly 202–59; and ch 7).

<sup>205</sup> PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015). For example, direct reference was made to the inquiry conducted by the LCA Committee at pages 36, 47, 60 and 141; direct reference was made to the PJCHR at 38, 87, 98, 232, 234–5 and 247; direct reference was made to the SSCSB at 74, 163, 191 and 209.

<sup>206</sup> Ibid. Direct reference to the Statement of Compatibility accompanying the Bill and to Article 17 of the ICCPR was made at 36, 49, 52 and 55; reference was made to the Statement of Compatibility and the issue of common law privileges at 63; reference was made to the Statement of Compatibility and the findings of the PJCHR on the issue of what constitutes the 'data set' at 87 and 98; and reference was made to the PJCHR's discussion of the data retention period at 112.

relevant to national security or government activity that may be in the public interest.<sup>207</sup> The PJCIS made 39 recommendations for amendments to the Bill, including that:

- the relevant data set be defined in primary legislation;<sup>208</sup>
- the Bill make it clear that service providers are not required to collect and retain customer passwords, PINs, web-browsing histories or other destination information;
- data retained be de-identified or destroyed after two years;<sup>209</sup>
- the Bill include detailed reporting and oversight regimes, including detailed reporting requirements to the PJCIS;<sup>210</sup> and
- that a separate parliamentary inquiry be instigated into the impact of the proposed provisions on journalists and their sources.<sup>211</sup>

On 3 March 2015 the government announced that it would accept all of the PJCIS's recommendations<sup>212</sup> and moved quickly to introduce amendments.<sup>213</sup> The government also agreed to commence a separate PJCIS inquiry into the impact of the regime on journalists.<sup>214</sup>

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<sup>207</sup> Ibid. Consideration of how these issues had been approached in comparable jurisdictions, and in particular by the European Union, was also included in the report and in many of the more detailed written submissions. For a further overview of approaches in comparable jurisdictions see PJCHR, Parliament of Australia, *Fifteenth Report of 44<sup>th</sup> Parliament* (2014) 10, 18. Like the LCA References Committee, the PJCIS also looked at alternatives to the proposed data retention regime, including models that would require a warrant before data was accessed.

<sup>208</sup> Ibid Recommendation 2.

<sup>209</sup> Ibid Recommendation 5.

<sup>210</sup> Ibid Recommendation 10.

<sup>211</sup> Ibid Recommendation 26. The PJCIS also recommended that the government provide a response to the outstanding recommendations from the PJCIS's 2013 report by 1 July 2015 and made recommendations to limit the range of agencies able to access retained data and to strengthen safeguards relating to the sharing and use of data between agencies. Ibid, List of Recommendations xiii.

<sup>212</sup> Senator the Honourable George Brandis QC, Attorney-General and The Honourable Malcolm Turnbull MP, Minister for Communications, 'Government response to committee report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Media Release, 3 April 2015).

<sup>213</sup> All of the government amendments to the Bill were passed and revised and supplementary Explanatory Memoranda issued attributing the amendments directly to the work of the PJCIS. See Revised Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), General Outline [7]; Supplementary Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), General Outline [1]–[7].

<sup>214</sup> On 4 March 2015, Attorney-General Brandis asked the PJCIS to inquire into and report on the question of 'how to deal with the authorisation of a disclosure or use of telecommunications data for the purpose of determining the identity of a journalist's source'. On 8 April 2015 the PJCIS tabled a report concluding its inquiry.

Following pressure from the ALP Opposition and media groups, the government introduced amendments to establish a ‘journalist information warrant’, designed to protect the confidentiality of journalists’ sources.<sup>215</sup> As discussed further in Chapter 6, frequent reference was made to the PJCIS’s recommendations during the second reading debates on the Bill and further unsuccessful amendments were introduced in the Senate by the minor parties and independents, building on the issues raised by submission makers to both the LCA References Committee and the PJCIS.<sup>216</sup>

The Data Retention Bill was also considered by the PJCHR<sup>217</sup> in a report tabled well in advance of either the PJCIS or LCA References Committee reports. The PJCHR’s report focused on the potential for the Bill to unjustifiably interfere with the right to privacy protected by Article 17 of the ICCPR.<sup>218</sup> In a relatively unusual step, the PJCHR issued a consensus recommendation that the Bill be amended to:

provide that access to retained data be granted only on the basis of a warrant approved by a court or independent administrative tribunal, taking into account the necessity of access for the purpose of preventing or detecting serious crime and defined objective grounds as set out [earlier in the report].<sup>219</sup>

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See PJCIS, Parliament of Australia, *Inquiry into the authorisation of access to telecommunications data to identify a journalist’s source* (2015).

<sup>215</sup> See Supplementary Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth).

<sup>216</sup> For example, Australian Greens Senator Scott Ludlam introduced unsuccessful amendments to extend the ‘journalist information warrant’ scheme to all access to data retained under the Bill, which was also included in amendments circulated by Senator Leyonhjelm. See Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth), Amendments to be moved by Senator Ludlam, on behalf of the Australian Greens, in committee of the whole. Amendment sheets were also circulated by Senator Xenophon relating to journalist information warrants and public interest advocates. Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth), Amendments to be moved by Senator Xenophon in committee of the whole. While these amendments were not passed during the debate on the Data Retention Bill, some of their key themes are reflected in the successful government amendments moved in response to the issue of journalists. See Supplementary Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015 (Cth), 3.

<sup>217</sup> PJCHR, Parliament of Australia, *Fifteenth Report of 44<sup>th</sup> Parliament* (2014) 10.

<sup>218</sup> Ibid 18. The PJCHR had regard to comparative jurisdictions, including the European Union, and consideration of similar laws by the European Court of Human Rights.

<sup>219</sup> Ibid 18.

The PJCHR also recommended that the Bill be amended to define the types of data that are to be retained,<sup>220</sup> and to limit the range of agencies with access to retained data.<sup>221</sup> The PJCHR also sought further information from the Attorney-General as to ‘whether the two year retention period is necessary and proportionate in pursuit of a legitimate objective’<sup>222</sup> and recommended that consideration be given to amending the proposed scheme to ensure that individuals were notified when their data has been accessed.<sup>223</sup> While the PJCHR did not receive a positive response to its recommendations for amendment from the government, many of its concerns were noted in the reports of both the LCA References Committee and the PJCIS, and many of its recommendations were reflected in the PJCIS’s recommendations.<sup>224</sup>

The Data Retention Bill was also scrutinised by the SSCSB.<sup>225</sup> In its Alert Digest, the SSCSB expressed concerns about the extent to which the Bill interfered with the right to privacy, and the way the Bill left many key matters, including the meaning of ‘data’, to delegated legislation.<sup>226</sup> In its final report on the Bill, issued after the government had agreed to implement the PJCIS recommendations, the SSCSB reiterated its strong concerns about the use of delegated legislation and instruments to prescribe the type of data to be retained under the scheme and to list the types of agencies that would have access to such data.<sup>227</sup>

Taken together, the Data Retention Bill experience provides another example of the cumulative legislative impact of multi-committee review. In this case, the PJCIS had a strong, direct legislative impact, with all of its recommendations implemented through successful government

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<sup>220</sup> Ibid 14.

<sup>221</sup> Ibid 16–17.

<sup>222</sup> Ibid 15.

<sup>223</sup> Ibid 21.

<sup>224</sup> However, it should be noted that, as discussed above, the recommendation that data only be accessed with a warrant did not form part of the PJCIS’s recommendations and was only reflected in government amendments to the Bill in so far as it applied to journalists.

<sup>225</sup> SSCSB, Parliament of Australia, *Alert Digest No 16 of 2014* (2014) 2; SSCSB, Parliament of Australia, *Report No 1 of 2015* (2015) 113. This report was issued following the receipt of further information from the Attorney-General in response to the committee’s request on 4 February 2015.

<sup>226</sup> The SSCSB also requested advice from the government about other mechanisms to increase parliamentary oversight in relation to regulations prescribing the data set, those prescribing additional services to which the data set will apply and ministerial declarations of further authorities and bodies as a ‘criminal law enforcement agency’. SSCSB, Parliament of Australia, *Alert Digest No 16 of 2014* (26 November 2014) 2, 6.

<sup>227</sup> SSCSB, Parliament of Australia, *Report No 1 of 2015* (2015) 113, 118.

amendments. In addition, the PJCIS's 2013 report provided the framework for much of the public and parliamentary debate on the Data Retention Bill when introduced. The work of the LCA References Committee, the PJCHR and the SSCSB is also evident in the submissions to the PJCIS and in the PJCIS's report on the Bill. Further, many of the recommendations made by the PJCHR and issues raised by the SSCSB were reflected in legislative amendments introduced in response to the PJCIS report.<sup>228</sup> These committee reports may have also influenced opposition and minor party parliamentarians to pressure the government to introduce the 'journalist information warrant' regime.

As discussed in Chapter 6, the Data Retention Bill related to a subject matter that was intrinsically interesting to media organisations and journalists, which no doubt influenced the significant public attention the Bill received. However, the very large number of submissions to the committee inquiries, and the diversity of the organisations and individuals providing evidence, suggests that parliamentary committees provided a practical forum for parliamentarians and sophisticated submission makers to develop concrete ways of ameliorating some of the rights-abrogating features of the proposed legislation. In these types of scenarios, where public support for rights-enhancing change is strong, government backbenchers, opposition members and minor parties may be particularly strident in their push for reform, even with respect to Bills that had originally received bipartisan support. As discussed further in Chapter 6, this can be a sign of the important role parliamentary committees play in fostering deliberative democracy at the federal level.

*(b) The Foreign Fighters Act 2014 (CSA 11)*

As noted in Chapter 3, the Abbott Government introduced the Foreign Fighters Bill in response to the 'serious and ongoing terrorist threat' posed to Australia by the return of 'foreign fighters' (those Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas).<sup>229</sup> The Bill amended 22 separate Acts.<sup>230</sup> Its key provisions

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<sup>228</sup> See, eg, PJCIS, Parliament of Australia, *Inquiry into the authorisation of access to telecommunications data to identify a journalist's source* (2015) Recommendations 2, 3, 10 and 13.

<sup>229</sup> Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [1]. The Explanatory Memorandum also provides that the Bill implements recommendations in the INSLM's second and fourth annual reports and the final report of the COAG Review of Counter-Terrorism Legislation: Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [2]–[3].

<sup>230</sup> The Commonwealth Acts include: *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth); *Criminal Code Act* 1995 (Cth); *Crimes Act* 1914 (Cth); *Australian Security Intelligence Organisation* 1979 (Cth);

included: the establishment of a new offence of entering a ‘declared area’ in which a terrorist organisation is engaging in hostile activity;<sup>231</sup> a new offence of ‘advocating terrorism’;<sup>232</sup> amendments to the terrorist organisation training offences;<sup>233</sup> the introduction of a delayed notification search warrant regime;<sup>234</sup> and a ten-year extension of the control order and preventative detention order regimes, and the questioning and detention regime.<sup>235</sup>

Despite moving rapidly through Parliament,<sup>236</sup> four separate parliamentary committees scrutinised the Foreign Fighters Bill, but not the LCA Committees. This decision, adopted by the government members of the LCA Committees (and opposed by the non-government members) was made on the basis that the PJCIS was already inquiring into the Bill.<sup>237</sup>

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*Intelligence Services Act 2001 (Cth); Telecommunications (Interception and Access) Act 1979 (Cth); Australian Passports Act 2005 (Cth); Foreign Passports (Law Enforcement and Security) Act 2005 (Cth); Terrorism Insurance Act 2003 (Cth); Customs Act 1901 (Cth); Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth); Migration Act 1958 (Cth); Foreign Evidence Act 1994 (Cth); A New Tax System (Family Assistance) Act 1999 (Cth); Paid Parental Leave Act 2010 (Cth); Social Security Act 1991 (Cth); Social Security (Administration) Act 1999 (Cth). It also made consequential amendments to Administrative Decisions (Judicial Review) Act 1977 (Cth); Sea Installations Act 1987 (Cth); National Health Security Act 2007 (Cth); Proceeds of Crime Act 2001 (Cth); AusCheck Act 2007 (Cth).*

<sup>231</sup> Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) Item 110 Proposed Part 5.5 of the Criminal Code; see also Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [16].

<sup>232</sup> Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) Item 61; see also Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [15] and [135].

<sup>233</sup> Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) Items 68–71; see also Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [15] and [148].

<sup>234</sup> Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) Item 51, new Part IAAA of the *Crimes Act 1915* (Cth); see also Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [14] and [106].

<sup>235</sup> Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) Items 72–108; see also Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [13], [148]–[145]. The Bill also included changes to the laws concerning passports and visas, permitting cancellation by authorities on national security grounds, including suspicion of involvement in hostile activity overseas. Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) Items 11 and 12; see also Explanatory Memorandum, Counter-Terrorism Amendment (Foreign Fighters) Bill 2014 (Cth) [12] and [40].

<sup>236</sup> The Bill was introduced on 24 September 2014 and passed on 30 October 2014.

<sup>237</sup> See LCA Legislation Committee, Parliament of Australia, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bills 2014* (2014) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Foreign\\_Fighters](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Foreign_Fighters)>.



The PJCIS's three-week inquiry into the Bill attracted over 50 submissions, involved three days of hearings, and resulted in an extensive consensus report.<sup>238</sup> In its report, the PJCIS referred extensively to past independent reviews and parliamentary committee reports, including the 2012 and 2013 INSLM annual reports<sup>239</sup> and the 2012 COAG review of the control order and preventative detention order regimes and stop and search powers.<sup>240</sup> The PJCIS accepted the evidence provided from government agencies on the need for the new offences and powers proposed in the Bill. However, it also acknowledged the rights-intrusive nature of the proposed new measures, and warned of the need to ensure that the proposed provisions were accompanied by strong safeguards and oversight mechanisms.<sup>241</sup> This is reflected in the PJCIS's 36 recommendations, which included:

- improving the safeguards in the preventative detention order regime to include the requirement for the Ombudsman to be notified of certain events;<sup>242</sup>
- introducing a new sunset clause (24 months after the next election) for the questioning and detention regime, the control order and preventative detention order regime and the stop, search and seizure powers relating to terrorism offences<sup>243</sup>
- increasing the PJCIS's oversight powers to include the counter-terrorism activities of the AFP;<sup>244</sup>
- limiting the definition of 'hostile activity' in the proposed new offences to conduct which would be considered to be a 'serious offence' if undertaken within Australia;<sup>245</sup>
- ensuring that declarations of declared areas for the purposes of the new offences can only be made by the Minister for Foreign Affairs and only if a 'terrorist organisation is

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<sup>238</sup> PJCIS, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 2–3.

<sup>239</sup> Ibid 10, 63, 77, 79.

<sup>240</sup> Ibid 46, 52, 63.

<sup>241</sup> Ibid 13, [2.39].

<sup>242</sup> Ibid Recommendation 12.

<sup>243</sup> Ibid Recommendation 13.

<sup>244</sup> Ibid Recommendation 14.

<sup>245</sup> Ibid Recommendation 16.

engaging in a hostile activity’ in that area. These declarations must be in the form of disallowable instruments and subject to disallowance by Parliament;<sup>246</sup>

- requiring the PJCIS to conduct a review of each ‘declared area’ declaration made, within the disallowance period for each declaration;<sup>247</sup> and
- subjecting the proposed new declared area offences to a sunset clause two years after the next election.<sup>248</sup>

The government agreed to implement all of these recommendations<sup>249</sup> and introduced amendments to this effect, directly referencing the work of the PJCIS in second reading speeches and in supplementary Explanatory Memoranda.<sup>250</sup> The government amendments were passed, as well as amendments proposed by the opposition in the Senate, which inserted a ‘legitimate purpose’ exception into the new declared areas offence regime.<sup>251</sup> The opposition also moved successful amendments to clarify that the ‘advocating terrorism’ offence does not apply to ‘a person who engages in good faith in public discussion of any genuine academic, artistic, scientific, political or religious matter’.<sup>252</sup>

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<sup>246</sup> Ibid Recommendation 18.

<sup>247</sup> Ibid Recommendation 19.

<sup>248</sup> Ibid Recommendation 20.

<sup>249</sup> George Brandis, Attorney-General, ‘Government Response to the Committee’s Report on the Foreign Fighters Bill’ (Media Release, 22 October 2014).

<sup>250</sup> See Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth).

<sup>251</sup> Under this amendment, the declared area offence provision does not apply if the person enters or remains in the area for a legitimate purpose such as providing aid of a humanitarian nature, performing an official duty, working in a professional capacity as a journalist or making a bona fide visit to a family member. Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), Amendments to be moved by Senator Collins, on behalf of the Opposition, in committee of the whole.

<sup>252</sup> Unsuccessful amendments were also moved by the Australian Greens and independent Senator David Leyonhjelm, addressing some of the concerns raised by the PJCHR relating to freedom of speech and the delayed notification search warrant regime. See, eg, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), Amendments to be moved by Senator Wright, on behalf of the Australian Greens, in committee of the whole; Amendments to be moved by Senator Leyonhjelm, on behalf of the Liberal Democratic Party, in committee of the whole.

The SSCSB also considered the Bill, initially in a special Alert Digest tabled out of session<sup>253</sup> and later in two separate, longer reports.<sup>254</sup> These latter reports were tabled just as the Bill was reaching the second reading stage in the Senate, and just prior to passage of the amended Bill in the House.<sup>255</sup> In its Alert Digest and subsequent reports, the SSCSB referred to the relevant findings and recommendations of the INSLM and requested further information on why the government sought to depart in some respects from the INSLM's recommendations.<sup>256</sup> A key consideration for the SSCSB was whether persons subject to the proposed new executive powers in the Bill (such as passport or visa cancellation powers) had access to judicial review and the rules of natural justice.<sup>257</sup> In his response to the SSCSB's Alert Digest, the Attorney-General undertook to include further information in the revised Explanatory Memorandum.<sup>258</sup> The Attorney-General also noted the government's acceptance of the full range of PJCIS recommendations, which he asserted addressed many of the SSCSB's concerns.<sup>259</sup> Some issues, particularly those relating to access to judicial review following passport or visa cancellation decisions and those features of the Bill that diluted pre-existing safeguards for the control orders or preventative detention orders regime, continued to raise concerns for the SSCSB, which ultimately left these issues to the Senate as a whole to consider.<sup>260</sup>

The PJCHR also considered the Bill<sup>261</sup> but tabled its report *after* the conclusion of the second reading debate on the Bill in the Senate, and just two days before the amended Bill passed through the House. The PJCHR expressed strong frustration at the time frame it was given to

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<sup>253</sup> SSCSB, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

<sup>254</sup> SSCSB, Parliament of Australia, *Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014); SSCSB, Parliament of Australia, *Further Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

<sup>255</sup> See SSCSB, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

<sup>256</sup> *Ibid* 2.

<sup>257</sup> *Ibid* 14.

<sup>258</sup> See, eg, SSCSB, Parliament of Australia, *Further Report relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 3–7.

<sup>259</sup> *Ibid* 5–13.

<sup>260</sup> *Ibid* 9.

<sup>261</sup> PJCHR, Parliament of Australia, *Fourteenth Report of 2014* (2014). Note that the report was tabled after the second reading debate on the Bill in the Senate had finished, and just two days before the Bill passed through the House.

scrutinise this complex legislation and provide rights analysis on the pre-existing control order regime, which had been introduced prior to the establishment of the PJCHR and therefore had not previously be subject to detailed consideration by the committee.<sup>262</sup> The PJCHR made a series of requests for further information about the rights compatibility of the control orders regime, and to substantiate claims in the SoC that the proposed new measures were a necessary and proportionate response to the threat posed by foreign fighters to Australian national security.<sup>263</sup> The PJCHR also made a number of consensus findings of incompatibility with a number of human rights and recommended legislative amendments. For example, it found that:

- the control order regime and the preventative detention order regime is likely to be incompatible with Article 9 and 14 of the ICCPR;<sup>264</sup>
- the proposed delayed notification search warrant regime should be amended to require an applicant to demonstrate that it is not possible to obtain the evidence in another way;<sup>265</sup>
- the declared area offence provision is likely to be incompatible with the right to a fair trial and the presumption of innocence, unnecessarily restricts freedom of movement, and is likely to be incompatible with the right to equality and non-discrimination;<sup>266</sup> and

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<sup>262</sup> For example, the PJCHR observed that ‘the apparent urgency with which the national security legislation is being passed through the Parliament is inimical to legislative scrutiny processes, through which the committee’s assessments and dialogue with legislation proponents is intended to inform the deliberations of senators and members of the Parliament in relation to specific legislative proposals. The committee is concerned that the capacity of legislative scrutiny to contribute to achieving the fine balance between the preservation of traditional human rights and freedoms and the maintenance of national security is limited where the passage of such legislation is expedited.’ Ibid [1.20]. For further discussion of time frames see Chapter 6, Section B.

<sup>263</sup> These included requests for further advice from the Attorney-General on: whether the operation of the counter-terrorism laws will, in practice, be compatible with the rights to equality and non-discrimination, with particular attention to the issue of indirect discrimination; the human rights compatibility of each of the proposed amendments to the control orders regime and the preventative detention regime (including the proposed new ten-year sunset clauses), including whether each of the proposed amendments are a reasonable and proportionate measure for the achievement of the proposed policy objective; whether the delayed notification search warrant regime is compatible with the right to a fair trial; and whether the proposed introduction of the power to suspend passports for up to 14 days is compatible with the right to freedom of movement. PJCHR, Parliament of Australia, *Thirteenth Report of 2014* (2014).

<sup>264</sup> PJCHR, Parliament of Australia, *Fourteenth Report of 2014* (2014) 3, 15–25.

<sup>265</sup> Ibid 29–34.

<sup>266</sup> Ibid 34–7.

- the advocating terrorism offence provision, as currently drafted, is likely to be incompatible with the right to freedom of opinion and expression.<sup>267</sup>

Unlike the SSCSB, the PJCHR did not receive a response to its requests for further information or advice from the Attorney-General. As a result, the Bill was passed with amendments on 30 October 2014 that did not directly address the full range of rights concerns later raised by the PJCHR.

When taken together, the parliamentary scrutiny of this Bill had an important rights-enhancing legislative impact, despite the very tight time frame for undertaking inquiries and the complexity and range of new measures proposed. However, as discussed further in Chapter 6, the Foreign Fighters Bill is also an example of how the work of the PJCHR can be frustrated by the very short times between the introduction of a Bill and the second reading debate. Despite making findings of rights incompatibility and specific recommendations for amendment, the PJCHR's efforts to influence the content of the Bill were stifled as a result of its report being tabled after the conclusion of the second reading debate on the Bill in the Senate. This meant that Senators did not have access to the views of PJCHR prior to voting on the Bill, and members of the House received the PJCHR report just days before the amended Bill was passed. In addition, submissions makers to the PJCIS inquiry did not have access to the PJCHR's analysis of the Bill, and were therefore unable to integrate the PJCHR's concerns into their advocacy.

*(c) Counter-Terrorism Legislation Amendment Act (No 1) 2014 (Cth) (CSA 10)*

Just a month after introducing the Foreign Fighters Bill, and before that Bill had passed, the government introduced the Counter-Terrorism Legislation Amendment Bill (No 1) 2014. This Bill expanded the grounds upon which a control order can be requested and issued, reduced the information required to be provided to the Attorney-General when seeking an interim control

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<sup>267</sup> Ibid 50–2. The PJCHR also made recommendations relating to the use of foreign evidence to clarify that evidence obtained directly or indirectly through the use of torture would not be admissible. Ibid 36. The PCJHR further recommended that the extension of and amendments to the special powers regime and the stop, question, search and seizure powers not proceed until the PJCIS and the INSLM had conducted reviews of these powers. Ibid 25–9.

order, and extended the time before material must be provided to the Attorney-General where a request for an urgent interim control order has been made.<sup>268</sup>

The Bill was referred to the PJCIS (but not the LCA Committees)<sup>269</sup> for a short inquiry<sup>270</sup> that attracted 17 written submissions and involved one public hearing.<sup>271</sup> Many submissions drew attention to the INSLM's 2012 recommendation that control orders were 'not effective, not appropriate and not necessary' and that the regime should be repealed.<sup>272</sup> Some submissions also noted that the Bill's proposal to expand the control order regime was being pursued despite the majority of the COAG Review Committee having recommended strengthening safeguards in the *existing* control order regime.<sup>273</sup> In its report, the PJCIS referred to the work of the INSLM and the committee's own consideration of the control order regime as part of its inquiry into the Foreign Fighters Bill.<sup>274</sup> The report also noted that some of the safeguards proposed by COAG were not reflected in the Bill, such as the introduction of a system of 'Special Advocates' who would be able to access classified information and act on behalf of individuals. Some committee members supported the introduction of such a regime to accompany the

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<sup>268</sup> Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) sch 1, Items 6–29. The Bill also requires the Attorney-General to advise the PJCIS before amending a regulation that lists a terrorist organisation and to allow the committee to review any proposed change during the disallowance period. The Bill also makes changes to the *Intelligence Services Act 2001* (Cth). See Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) sch 2.

<sup>269</sup> For further discussion of this displacement of the LCA Committees as a forum for review of counter-terrorism laws see Chapter 8, Section A.

<sup>270</sup> Submissions were called for by 10 November 2014 and a report was issued on 20 November 2014.

<sup>271</sup> PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014).

<sup>272</sup> See, eg, Gilbert & Tobin Centre of Public Law, Submission No 1 to PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014). See also Independent National Security Legislation Monitor, *Declassified Annual Report* (2012) 4, 44; PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014) 11.

<sup>273</sup> See Australian Human Rights Commission, Submission No 14 to PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014); Council of Australian Governments Review of Counter-Terrorism Legislation, May 2013, 59. As discussed in PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014) 11.

<sup>274</sup> PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Counter-Terrorism Legislation Amendment Bill (No 1) 2014* (2014) 22.

changes proposed by the Bill.<sup>275</sup> The PJCIS also noted that the extended delay in appointing the INSLM left a gap in accountability and oversight of the control order regime<sup>276</sup> and recommended that the position be filled as a matter of urgency. Other recommendations included that:

- the meaning of a number of key terms be clarified;<sup>277</sup>
- when seeking the Attorney-General's consent to request an interim control order, the AFP must provide the Attorney-General with a statement of facts relating to why the order should be made, and any known facts as to why it should *not* be made;<sup>278</sup>
- requests to obtain the Attorney-General's consent to apply for an interim order should be dealt with within eight hours;<sup>279</sup> and
- the pre-existing safeguards relating to specifying and reviewing the conditions imposed as part of a control order should be re-instated.<sup>280</sup>

The government agreed to accept, or 'accept in principle', all of the PJCIS's recommendations<sup>281</sup> and introduced a number of successful government amendments to the

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<sup>275</sup> The PJCIS ultimately recommended that, 'in light of the proposed expansion of the control order regime, the Government task the newly appointed INSLM to consider whether the additional safeguards recommended in the 2013 COAG Review of Counter-Terrorism Legislation should be introduced'. Ibid Recommendation 1, 24.

<sup>276</sup> Ibid 23.

<sup>277</sup> For example, the PJCIS recommended that the terms 'supports' and 'facilitates' in the proposed amendments to the control order regime be based on language in the existing *Criminal Code Act 1995* (Cth) and that the Counter-Terrorism Legislation Amendment Bill (No 1) 2014 and its Explanatory Memorandum be amended to reflect this. Ibid Recommendation 2, 24.

<sup>278</sup> Ibid Recommendation 3, 25.

<sup>279</sup> Ibid Recommendation 4, 25.

<sup>280</sup> For example, the PJCIS recommended that the Bill be amended to ensure that an issuing court retains the authority to examine the individual obligations, prohibitions and restrictions in a draft control order to determine whether each condition is reasonably necessary, and reasonably appropriate and adapted. Ibid Recommendation 5, 26. It also recommended that the AFP continue to be required to explain why each of the obligations, prohibitions and restrictions proposed in a draft control order should, or should not, be imposed on the person: ibid Recommendation 6, 26.

<sup>281</sup> George Brandis, Attorney-General, Minister for the Arts, 'Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014' (Media Release, 25 November 2014).

Bill, and a supplementary Explanatory Memorandum attributing the legislative changes to the work of the PJCIS.<sup>282</sup>

On the same day, the PJCHR tabled its report on the Bill<sup>283</sup> containing strong criticisms of the SoC,<sup>284</sup> and noting that a far more detailed assessment of the control order regime's compliance with human rights should have been provided. The PJCHR also expressed the view that the proposed changes should not go ahead until an INSLM was appointed<sup>285</sup> and sought further information on these and other matters from the Attorney-General. However, no response was provided until 11 February 2015, well after the passage of Bill.<sup>286</sup>

The SSCSB also considered the Counter-Terrorism Legislation Amendment Bill (No 1) 2014,<sup>287</sup> referring to its detailed comments on the control order regime contained in its extensive reports on the Foreign Fighters Bill.<sup>288</sup> Like the PJCHR, the SSCSB also expressed concern that the provisions proposed in this Bill would expand the scope of the regime while also removing key safeguards.<sup>289</sup> The SSCSB requested further information on why the Bill departed from past findings made by the PJCIS, and failed to address the concerns raised by

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<sup>282</sup> Thirty successful government amendments were made to reflect the 15 recommendations made by the PJCIS: see Supplementary Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth), General Outline. Nine unsuccessful amendments were moved by Senator Wright that also aimed to improve the Bill's compliance with human rights. Counter-Terrorism Legislation Amendment Bill (No 1) 2014 (Cth) Amendments to be moved by Senator Wright, on behalf of the Australian Greens, in committee of the whole. The Bill passed both Houses on 2 December 2014 and received Royal Assent on 12 December 2014.

<sup>283</sup> PJCHR, Parliament of Australia, *Sixteenth Report of 44<sup>th</sup> Parliament* (2014), and response recorded in PJCHR, Parliament of Australia, *Twenty-Second Report of 44<sup>th</sup> Parliament* (2015).

<sup>284</sup> PJCHR, Parliament of Australia, *Sixteenth Report of 44<sup>th</sup> Parliament* (2014) [1.39].

<sup>285</sup> Ibid [1.32]

<sup>286</sup> Letter from Senator the Hon George Brandis QC, Attorney-General, to Senator Dean Smith (dated 11 February 2015) as referred to in PJCHR, Parliament of Australia, *Twenty-Second Report of 44<sup>th</sup> Parliament* (2015) 135. Following the late receipt of information from the Attorney-General, the PJCHR provided a further report on the Bill, tabled on 13 May 2015, that contained a range of disparate views on its rights compatibility. See PJCHR, Parliament of Australia, *Twenty-Second Report of 44<sup>th</sup> Parliament* (2015) 137.

<sup>287</sup> SSCSB, Parliament of Australia, *Alert Digest No 15 of 2014* (19 November 2014) 28.

<sup>288</sup> Ibid 29–31.

<sup>289</sup> Ibid 33–5.



the INSLM.<sup>290</sup> However, these requests for information were not answered prior to the passage of the Bill.<sup>291</sup>

The scrutiny experience of this Bill demonstrates a convergence of rights concerns being expressed by three different committees, but reveals that only one committee (the PJCIS) was able to translate these concerns into legislative change. The technical scrutiny committees were sidelined in this case by the lack of timely responses from the proponent Minister to their requests for information, which meant that their concluded views on the Bill were not available to parliamentarians at the vital second reading stage. Nor were they available to submission makers to the PJCIS. These issues will be discussed further in Part III, where a range of strategies are suggested to address the reporting practices of the SSCSB and the PJCHR and to encourage more collaboration between the technical scrutiny and inquiry-based committees.

*(d) The Citizenship Act (CSA 12)*

The final Act in this phase of scrutiny, the Citizenship Bill, was introduced in June 2015 in the context of escalating global and local concerns about the threat posed by ‘foreign fighters’ and ‘home-grown terrorists’.<sup>292</sup> It included a range of new measures designed to remove the Australian citizenship of anyone who travels overseas to participate in or support terrorist activity.<sup>293</sup> The Bill was referred to the PJCIS for inquiry and report,<sup>294</sup> and an attempt by the

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<sup>290</sup> Ibid 29–35.

<sup>291</sup> A response was received to the SSCSB’s requests for further information on 3 December 2014, and recorded in the SSCSB, Parliament of Australia, *Report No 1 of 2015* (2015). In its final report, the SSCSB reiterated many of its concerns about the expansion of the control order regime, the broad scope of key terms used, and the adequacy of safeguards. However, it also welcomed the further clarification provided by the Attorney-General in key areas, and referred to the recommendations of the PJCIS as helping to alleviate some of its most serious concerns.

<sup>292</sup> For an overview of the key features of the Citizenship Bill see Department of Parliamentary Services (Cth), *Bills Digest: Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*, No 15 of 2015, September 2015. See also S Pillai, ‘The rights and responsibilities of Australian citizenship: A legislative analysis’ (2014) 37(3) *Melbourne University Law Review* 736.

<sup>293</sup> Among many other provisions, the Citizenship Bill introduced three new ways in which an Australian dual national can cease to be an Australian citizen. These are where the person acts inconsistently with their allegiance to Australia by either: (1) engaging in specified terrorist-related conduct, (2) fighting for, or being in the service of, a declared terrorist organisation, or (3) being convicted of a prescribed terrorism offence. See Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) sch 1.

<sup>294</sup> PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015). The Attorney-General also asked the PJCIS to consider whether proposed conviction-based cessation of citizenship provisions should apply retrospectively to convictions prior to the commencement of the Act.

Australian Greens to have the Citizenship Bill referred to the LCA Legislation Committee was defeated.<sup>295</sup> The Bill was also considered by the SSCSB and the PJCHR.<sup>296</sup>

The PJCIS received 43 submissions and seven supplementary submissions to its inquiry,<sup>297</sup> and held three public hearings in addition to receiving private briefings.<sup>298</sup> This culminated in an extensive report containing 26 recommendations for amendment, subject to which the PJCIS recommended that the Bill be passed. All of these recommendations were accepted and reflected in successful government amendments.<sup>299</sup> In a number of instances, these changes could be described as rights-enhancing. For example, the amendments:

- make it clear that before a dual national can have their citizenship ‘renounced’ by doing something terrorist-related overseas, they must at least have *intended* to engage in the particular prescribed conduct (rather than been reckless or negligent);<sup>300</sup>
- narrow the range of conduct that can trigger the renunciation provisions, from the previously low-level ‘damage to Commonwealth property’ to a tighter list of conduct with a closer connection to an actual terrorist act;<sup>301</sup>

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<sup>295</sup> Commonwealth, *Parliamentary Debates*, Senate, 25 June 2015, 4600 (Penny Wright).

<sup>296</sup> The PJCIS issued its report on the Citizenship Bill on 4 September 2015: PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015). The PJCHR issued its report with respect to the Citizenship Bill almost a month before the PJCIS on 11 August 2015: PJCHR, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament* (2015). The SSCSB issued its report on 12 August 2015: SSCSB, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015). This relatively relaxed legislative time frame may be explained by the change of Australia’s Prime Minister from Tony Abbott to Malcolm Turnbull on 15 September 2015, which may have delayed the debates on the Citizenship Bill for longer than usual.

<sup>297</sup> PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

<sup>298</sup> Ibid. Public hearings were held on 4, 5 and 10 August 2015 and the PJCIS also received one private briefing and conducted one classified hearing. The PJCIS requested two extensions of time for issuing its report, finally issuing its advisory report on 4 September 2015.

<sup>299</sup> See Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth); see also Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), Government Amendments.

<sup>300</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) amended cl 33AA(3).

<sup>301</sup> Ibid amended cl 33AA(2).

- require the Minister for Immigration to notify the person who has ‘renounced’ their citizenship that he or she is no longer an Australian, and set out the person’s rights of review;<sup>302</sup> and
- make it clear that the laws cannot be applied to children under 14.<sup>303</sup>

The PJCHR also considered the Citizenship Bill in a lengthy and detailed report.<sup>304</sup> In its report, the PJCHR criticised many aspects of the SoC, in particular its failure to provide reasoning or evidence that the measures were reasonable to address a ‘pressing or substantial concern’.<sup>305</sup> The PJCHR also questioned the proportionality of having the citizenship revocation provisions triggered by offences that included damaging Commonwealth property and other relatively minor offences,<sup>306</sup> and expressed concerns with respect to:

- the lack of clarity around how decisions will be made by the Minister or officials to revoke a person’s citizenship;<sup>307</sup> and
- whether depriving a person of citizenship, and therefore potentially exposing them to deportation, is compatible with Australia’s non-refoulement obligations.<sup>308</sup>

The PJCHR requested further information from the Attorney-General and Minister for Immigration on these and other matters, but did not wait for a response before tabling its report on 11 August 2015. This proved prudent, as further advice from the Minister for Immigration was not received until 11 January 2016.<sup>309</sup>

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<sup>302</sup> Ibid amended cl 33AA(11).

<sup>303</sup> Ibid amended cl 33AA(1).

<sup>304</sup> PJCHR, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament* (2015).

<sup>305</sup> Ibid 11.

<sup>306</sup> Ibid 11. The PJCHR said that ‘it is not clear that removing citizenship from a person who has damaged property or who has published an item of news would protect national security or the Australian community’. The PJCHR also raised concerns about the fact that the automatic cessation of citizenship would occur at the time the conduct occurred and not on the basis of a conviction.

<sup>307</sup> Ibid 13.

<sup>308</sup> Ibid 23–4.

<sup>309</sup> PJCHR, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament* (2016) ch 2 ‘Concluded Matters’. This final report published excerpts from a response received to the PJCHR’s requests for further advice from the Minister for Immigration and Border Protection on 11 January 2016, some five months after the information was requested.

The SSCSB also considered the Citizenship Bill in its Alert Digest tabled prior to the resumption of second reading debate on the Bill,<sup>310</sup> and raised a number of strongly worded concerns.<sup>311</sup> For example, it said that: ‘serious issues of fairness arise given that a person may lose their citizenship on the basis of criminal conduct *without any of the protections associated with a criminal trial*’.<sup>312</sup> The SSCSB also found the ‘automatic’ nature of the cessation of citizenship provisions to be highly problematic,<sup>313</sup> and sought further explanations about why these provisions were considered necessary from the Minister of Immigration.<sup>314</sup> Like the PJCHR, the SSCSB did not receive a response to its requests for further information until several months after the enactment of the Citizenship Bill;<sup>315</sup> however, the SSCSB’s concerns were noted by the PJCIS in its report and by a number of submission makers to the PJCIS inquiry.<sup>316</sup>

Parliamentary scrutiny of the Citizenship Bill is another strong example of the cumulative and rights-enhancing legislative impact of multi-committee scrutiny of a Bill. In this case, the legislative impact of the PJCIS was clearly more direct, but was underpinned by the analysis provided by the SSCSB and its robust exchange of correspondence with the executive. Similarly, while the PJCHR may not have had a direct legislative impact, it was successful in alerting Parliament to the issues to consider when passing laws of this nature due to its decision to table its report prior to the commencement of the second reading debate, despite not receiving a response from the Minister.<sup>317</sup> As discussed further in Part III, early reporting by

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<sup>310</sup> SSCSB, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015) 3.

<sup>311</sup> The SSCSB also expressed concern about the scope of the regime, and sought a ‘detailed and particularised explanation from the Minister as to why conviction for each of the specified offences justifies the loss of citizenship’. Ibid 10.

<sup>312</sup> Ibid 6 (emphasis in original).

<sup>313</sup> Ibid 7.

<sup>314</sup> Ibid. The SSCSB also commented on the lack of clarity in the provisions of the Bill.

<sup>315</sup> SSCSB, Parliament of Australia, *Report No 4 of 2016* (2016) 256.

<sup>316</sup> For example, PJCIS Recommendations 2, 6, 8, 9 were designed to narrow the scope of the offences to which the conviction-based provisions of the Bill would apply, responding to concerns raised by the SSCSB in SSCSB, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015) 2, 8. A range of other PJCIS recommendations reflect concerns raised by the SSCSB, for example those relating to concerns about adequate judicial review: see PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) Recommendation 14.

<sup>317</sup> For example, in ch 8 (entitled ‘Children’) of the PJCIS’s report on the Citizenship Bill, the findings of the PJCHR were referred to on six occasions: see PJCIS, Parliament of Australia, *Advisory Report on the Provisions*

the PJCHR on rights-engaging Bills (even in the absence of a response from the proponent Minister) is one of the key recommendations of my research.

#### D *Summary of Findings on Legislative Impact*

The analysis above suggests that parliamentary committees had a significant rights-enhancing legislative impact on the case study Acts, despite strong bipartisan support for ‘tough on terror’ policies and even in the context of short reporting time frames and lack of timely responses to requests for information from proponents of a Bill. The strength of this legislative impact varied from committee to committee. For example, the PJCIS was a particularly strong performer, enjoying a high ‘strike rate’ (particularly since 2013) when it came to translating recommendations into legislative change, but also when it came to the rights-enhancing significance of the amendments it generated. The LCA Committees were particularly active in the first phase of scrutiny described above, generating popular and influential public inquiries that had important, rights-enhancing legislative outcomes, even if the LCA Committee recommendations were not implemented as consistently as those of the PJCIS in the post-2013 period. The fact that the LCA Committees have been effectively sidelined as forums to review counter-terrorism law since 2013 illustrates the dynamic nature of the committee system, and is an important sign that a committee’s legislative impact can shift significantly over time.

The evidence set out above also makes it clear that it was not just the inquiry-based committees that had a legislative influence on the case study Acts; the technical scrutiny committees also played an important, if less direct, role. In particular, the work of the technical scrutiny committees armed the inquiry-based committees and their submission makers with the information and analysis they needed to substantiate and justify the legislative changes they recommended. This is explored further in the next chapter.

Perhaps most significantly, the above analysis demonstrates that it is when multiple committees work together to scrutinise and review a Bill that the most significant legislative impact is felt. This is evident in both the early cases of the Control Order Bill and ASIO Bill 2002, which were considered by the SSCSB, PJC ASIO and the LCA Committees, and also in the post-2013

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*of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) ch 8, and Recommendation 20.

Bills which were considered by the PJCIS, SSCSB and the PJCHR. As discussed further in Part III, this suggests that, by working together, the committees can address the tensions in legitimacy and participation discussed in Chapter 4 – with the technical scrutiny committees providing legitimate and clear analytical frameworks for submission makers to draw upon and the inquiry-based committees providing participatory forums to develop specific recommendations for reform. This has important implications for the types of changes I recommend in Part III. For example, it encourages an approach that enhances the value and utility of the reports and publications issued by the SSCSB and the PJCHR from the perspective of the inquiry-based committees and their submission makers. It also suggests a need to preserve the features of the PJCIS that help account for its consistently strong legislative impact on the case study Acts, including its strong relationships with the executive and its agencies. As will be discussed further in the next chapter, this approach is supported by the findings made with respect to the public and hidden impacts of the parliamentary committees studied.

It is also important to underscore again that, in the vast majority of cases, the legislative impact that is occurring as a result of parliamentary committee scrutiny is *rights-enhancing*, even if the amendments made regularly fail to completely remedy the concerning features of the proposed new counter-terrorism measure.<sup>318</sup> As discussed in Chapter 1, this may give rise to scepticism by some scholars about the overall strength of the committee system as a component of Australia's parliamentary model of rights protection. However, as explored further in Part III, the significance of the amendments attributable to parliamentary committee work should not be underestimated, even if they are far from perfect from a rights advocate's perspective.

In addition, the type of successful rights-enhancing legislative changes attributable to parliamentary scrutiny suggest that a particular type of rights-scrutiny culture may be emerging at the federal level that could be valuable for those seeking to improve (or even replace) Australia's current model of rights protection. For example, from the case study Acts above, the most common rights-enhancing amendments that can be directly attributable to committees included: clarifying and narrowing the scope of new investigative powers or offences; introducing stronger safeguards or protections for common law privileges and procedural fairness; requiring ongoing independent or parliamentary oversight or review; limiting the

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<sup>318</sup> A summary of these changes is provided at Appendix D.

discretion to be applied by members of the executive; and/or limiting the effect of new measures or offences on children.<sup>319</sup> Provisions that sought to give Ministers or law enforcement or intelligence officers powers to interfere with rights of speech, association, privacy, citizenship or procedural fairness also appeared to attract significant attention from the committees, and generated legislative amendments that sought to dilute or limit this interference. These commonly emerging rights and scrutiny principles are explored further in the next chapter and in Part III of the thesis, where it is noted that further research is needed to determine whether this finding could have broader application beyond the case study adopted in my research.

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<sup>319</sup> See also Appendix D.

## CHAPTER 6: PUBLIC IMPACT

### A *Why Look for Public Impact?*

This chapter sets out evidence of the *public impact* of the four parliamentary committees studied on the 12 case study Acts. As noted in Chapter 2, in this thesis, ‘public impact’ means evidence that the parliamentary committee influenced or was considered in public or parliamentary debate on the case study Act or during a post-enactment review of the Act. Evidence of public impact includes reference to the findings or recommendations of a committee in Hansard, media reports or academic commentary, or in reports of post-enactment oversight bodies or review mechanisms.

Public impact is distinct from legislative impact (considered in Chapter 5) because it looks for influence beyond amendments to a clause of a Bill; however, there is necessarily a clear relationship between the two. A committee with a strong, direct legislative impact will invariably feature in the parliamentary debate on a proposed law, for example when proponents of the law refer to the recommendations of the committee when introducing amendments. In addition, members of committees with strong legislative impact may frequently refer to their involvement in the committee when debating the proposed law in Parliament and in public. However, evidence of public impact does not merely reflect strong legislative impact. Looking for evidence of public impact can also identify the long-term influence of parliamentary scrutiny on the content of the law, recognising that sometimes it can take years for the full impact of the work of parliamentary committees to become apparent.<sup>1</sup>

Examining public impact is particularly important for understanding how committees contribute to the parliamentary model of rights protection in Australia. As discussed in Chapter 3, parliamentary committees can help establish a ‘culture of rights scrutiny’ by providing a forum for members to share their views on a proposed law, including pointing out what they

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<sup>1</sup> As AHRC Policy Director Darren Dick said, speaking of the PJCHR and its long-term impact on the Northern Territory Intervention legislation: ‘I think it’s clear that if you judge [the impact of the PJCHR] at that initial point at when that legislation came in, and ask whether committee processes were sufficient at the time, your answer is no, but if you look at it seven years later, you see the way things changed, then it’s very clear that [the committee processes] had a very significant impact’. Interview with Darren Dick, Australian Human Rights Commission (Sydney, 31 May 2016).



consider to be the rights implications of the proposed law. This can help identify any unintended or unjustified rights implications arising from a proposed law, and generate new, less rights-intrusive, legislative or policy options. Parliamentary committees can also help parliamentarians to weigh competing arguments or different policy options,<sup>2</sup> either through the public process conducted by the inquiry-based committees, or through the consideration of written analysis provided by the technical scrutiny committees. This weighing process becomes particularly relevant when considering the enactment of counter-terrorism laws which, as Dalla-Pozza explains, are regularly accompanied by the claim that counter-terrorism laws must strike an appropriate ‘balance’<sup>3</sup> between safeguarding Australia’s national security and preserving individual rights and liberties.<sup>4</sup> This bipartisan commitment to ‘striking the right balance’ when enacting counter-terrorism laws is evident from Dalla-Pozza’s earlier study<sup>5</sup> and my research,<sup>6</sup> even if the enacted outcomes leave some commentators sceptical of the efficacy of this process.<sup>7</sup>

One way to test whether the Parliament has engaged in this weighing process in a meaningful way is to look at the role parliamentary committees play in the development of a particular law. This is because a committee inquiry, or an independent analysis of the key features of a Bill, can demonstrate the capacity of Parliament to gather and disperse information, or bring new

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<sup>2</sup> John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (CUP, 1998) 25; Dominique Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?’ (2016) 27(4) *Public Law Review* 271, 274

<sup>3</sup> As will be explored further below, the bipartisan parliamentary focus on ‘striking the right balance’ when enacting counter-terrorism laws comes through strongly in the language used in Hansard when debating the case study Acts.

<sup>4</sup> Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework’, above n 19, 272–4.

<sup>5</sup> Ibid. See also Dominique Dalla-Pozza, ‘Promoting deliberative debate? The submissions and oral evidence provided to Australian parliamentary committees in the creation of counter-terrorism laws’ (2008) 23(1) *Australasian Parliamentary Review* 39.

<sup>6</sup> This is discussed further below, including by reference to Table 6.2. See also the following Hansard debates on the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth): Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2015, 13558 (Warren Entsch); Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2015, 13326 (Lisa Chesters); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 November 2015, 13117–18, 9504. (Michael Danby).

<sup>7</sup> See, eg, George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35(3) *Melbourne University Law Review* 1136; Andrew Lynch, ‘Legislating with urgency – the enactment of the Anti-Terrorism Act (No 1) 2005’ (2006) 30(3) *Melbourne University Law Review* 747; Shawn Rajanayagam, ‘Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act’ (2015) 38(3) *University of New South Wales Law Journal* 1046.

voices into the public debate.<sup>8</sup> It can also provide insights into the nature of the parliamentary debate that occurred on the proposed law, including the time allocated for debate, whether alternative policy options were considered, and whether the impact of the law on individual rights was discussed.

This chapter argues that the public impact parliamentary committees had on the case study Acts was significant and generally rights-enhancing. This was particularly the case when multiple committees worked together to scrutinise proposed provisions and offered less rights-intrusive policy alternatives for governments to consider. This chapter also suggests that there may be an emerging commonality when it comes to the types of rights the parliamentary committees in this study focus on when scrutinising the case study Acts, and those discussed in parliamentary and public debates on the case study Acts. As explored further in Part III, this in turn reveals something useful about the rights-scrutiny culture that may be developing at the federal level.

## B *Time for Parliamentary Scrutiny and Debate*

If the work of parliamentary committees is going to have any impact on the content of a proposed law there must be adequate time for parliamentary scrutiny to take place.<sup>9</sup> The counter-terrorism law-making experience outlined in Chapter 3 suggests that this may not always be the case, as some of the case study Bills were ‘rushed’ through Parliament with little, if any, time for calm, considered parliamentary debate.<sup>10</sup>

As noted in Chapter 5, where the second reading debate on a Bill concludes prior to the tabling of a committee’s report, the opportunity for that committee to have an immediate impact on

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<sup>8</sup> See, eg, Malcolm Shaw, ‘Parliamentary Committees: A Global Perspective’ (1998) 4(1) *Journal of Legislative Studies* 225; Gareth Griffith, ‘Parliament and Accountability: The Role of Parliamentary Oversight Committees’ (Briefing Paper No 12/05, Parliamentary Library Research Service, New South Wales, 2005).

<sup>9</sup> See, eg, John Uhr, ‘Parliamentary Measures: Evaluating Parliament’s Policy Role’ in Ian Marsh (ed), *Governing in the 1990s: An agenda for the decade* (CEDA/Longman, 1993) 347; Malcolm Aldons, ‘Problems with Parliamentary Committee Evaluation: Light at the End of the Tunnel?’ (2003) 18(1) *Australasian Parliamentary Review* 79.

<sup>10</sup> See, eg, Lynch, above n 7; George Williams and Edwina MacDonald, ‘Combating Terrorism: Australia’s Criminal Code since September 11, 2001’ (2007) 16 *Griffith Law Review* 27; George Williams, Nicola McGarrrity and Fergal Davis, ‘Mapping the Terrain’ in F Davis, N McGarrrity and G Williams (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014) 3; Lisa Burton and George Williams, ‘What Future for Australia’s Control Order Regime’ (2013) 24 *Public Law Review* 182.

the enacted law or on the parliamentary debate can be severely limited.<sup>11</sup> This is because parliamentarians are required to make a public statement about the merits of a proposed Bill without the benefit of the information generated from the committee's inquiry, or the analysis contained in the committee's scrutiny report. Short time periods between committee reporting and the commencement of second reading debates also add pressure to those responsible for drafting the Bill and any government amendments made in response to committee recommendations.<sup>12</sup>

For some committees, the Senate Standing Orders provide some protection against the resumption of the second reading debate prior to the tabling of committee reports. For example, the Senate Standing Orders provide that a second reading debate cannot resume until the tabling of the reports of any relevant Senate committees.<sup>13</sup> However, while designed to guard against uninformed debate, these orders can sometimes add to the time pressures experienced by Senate committees and their staff. As former LCA Committee Secretary Ms Dunstone explained:

The Senate doesn't bring on Bills for debate until committee reports are tabled, and so that's partly where some of that time pressure on committee inquiries is borne out. Governments don't want their legislative timetable delayed by committee inquiries and reporting. So often it will be the day that the committee's report is tabled, or the very next day, that the Bill is listed for debate.<sup>14</sup>

The same Standing Orders do not apply to the tabling of joint committee reports, meaning that the second reading debate on a Bill can commence *prior* to the tabling of a joint committee report. As noted in Chapter 5, this has led to occasions where the PJCHR has not had sufficient

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<sup>11</sup> For example, as noted in Chapter 5, the PJCHR's report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 was tabled *after* the second reading debate on the Bill had concluded. See PJCHR, *Fourteenth Report of 2014* (2014) 3.

<sup>12</sup> See, eg, Interview with Meredith Leigh and Naomi Carde, Office of Parliamentary Counsel (Canberra, 24 May 2016); Interview with Official A, Attorney-General's Department (Canberra, 23 May 2016); Interview with Official B, Attorney-General's Department (Canberra, 30 May 2016); Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016).

<sup>13</sup> Senate, Parliament of Australia, *Standing Order* 38 (24 August 1994); Senate, Parliament of Australia, *Standing Order* 62 (14 October 1991).

<sup>14</sup> Interview with Sophie Dunstone, former Secretary of the LCA Committees (Canberra, 23 May 2016).

time to table its report on a case study Bill prior to the resumption of the second reading debate in either the Senate or the House.

For Dalla-Pozza, providing adequate time for meaningful parliamentary scrutiny of proposed laws is integral to ‘striking the right balance’ between liberty and security when enacting counter-terrorism laws.<sup>15</sup> Like many other scholars, Dalla-Pozza’s work suggests that a shorter time allocated for scrutiny results in poorer quality scrutiny.<sup>16</sup> While the evidence presented in this chapter certainly confirms that a committee that is unable to table its report prior to the completion of the second reading debate on the Bill will struggle to have a strong impact on the content of the law, my research also presents a more complex picture of the relationship between the *time* allocated for scrutiny and the *strength* of the impact of the scrutiny on the Bill. My research suggests that other factors may be at play that have more influence on the overall impact of parliamentary committees on the case study Acts than time alone. These findings are discussed in further detail below, and are supported by Table 6.1, which summarises how much time was allocated to formal parliamentary scrutiny and parliamentary debate for each case study Act. This table also draws upon information from Chapter 4 to help identify whether tight periods have a correlation with lower levels of public or parliamentary participation.

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<sup>15</sup> See, eg, Dalla-Pozza, ‘Refining the Australian Counter-terrorism Framework’, above n 19.

<sup>16</sup> See, eg, *ibid*; Lynch, above n 7.

**Table 6.1: Time Periods for Scrutiny and Debate of Counter-Terrorism Laws**

|   | Introduction to enactment                   | Time for scrutiny                   | Time for submissions | Number of submissions       | Public hearings   | Second reading speeches | Committee of the whole debate   |
|---|---|-------------------------------------|----------------------|-----------------------------|-------------------|-------------------------|---------------------------------|
| <b>Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Other</b>                            | 94 days                                     | 38 days (LCA)                       | 13 days (LCA)        | 431 (LCA)                   | 4 days (LCA)      | 27                      | 3 days Senate                   |
| <b>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill (No 1) 2002</b> | 240 days                                    | 89 days (PJCA SIO)<br>80 days (LCA) | 30 days              | 150 (PJCA SIO)<br>Nil (LCA) | 3 days (PJCA SIO) | 36                      | 3 days Senate                   |
| <b>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003</b>        | 90 days                                     | 43 days (LCA Ref)                   | 17 days              | 435 (LCA Ref)               | 3 days (LCA Ref)  | 23                      | 4 days Senate                   |
| <b>Anti-Terrorism Bill 2004</b>   | 48 days                                     | 5 weeks (LCA)                       | 12 days (LCA)        | 28                          | 1 day (LCA)       | 13                      | 2 days Senate                   |
| <b>National Security Information (Criminal Proceedings) Bill 2004 (Cth)</b>                             | 195 days ( <i>lapsed and reintroduced</i> ) | 63 days (LCA)                       | 16 days              | 23                          | 1 day (LCA)       | 5                       | 2 days Senate                   |
| <b>Anti-Terrorism Bill (No 2) 2005</b>  | 41 days                                     | 25 days (LCA)                       | 8 days               | 294                         | 3 days (LCA)      | 52                      | 1 day House<br>1 day Senate     |
| <b>National Security Legislation Amendment Bill 2010</b>  | 240 days ( <i>lapsed and reintroduced</i> ) | 3 months (LCA)                      | 32 days              | 23                          | 1 day             | 19                      | 2 days House<br>1 day Senate    |
| <b>Independent National Security Legislation Monitor Bill 2010</b>                                      | 285 days                                    | 42 days (SCFPA)                     | 32 days              | 15                          | 1 day             | 21                      | 1 day Senate                    |
| <b>Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014</b>                             | 39 days                                     | 23 days (PJCS)                      | 9 days               | 46                          | 3 days            | 21                      | 2 days Senate                   |
| <b>Counter-Terrorism Legislation Amendment Bill (No 1) 2014</b>   | 6 weeks                                     | 21 days (PJCS)                      | 11 days              | 17                          | 1 day             | 15                      | 1 day House<br>2 days in Senate |
| <b>Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014</b>                 | 5.5 months                                  | 96 days (PJCS)                      | 58 days (PJCS)       | 204                         | 3 days            | 41                      | 3 days Senate                   |
| <b>Citizenship Amendment (Allegiance to Australia) Bill 2015</b>  | 5.5 months                                  | 72 days (PJCS)                      | 26 days              | 43                          | 3 days            | 68                      | 3 days Senate<br>1 day House    |

## 1 *Period Between Introduction and Enactment*

Table 6.1 suggests that the shortest time between introduction and enactment occurred with the Foreign Fighters Bill (39 days), closely followed by the Control Orders Bill (41 days). As Dalla-Pozza notes, these Bills have experiences in common other than short time frames.<sup>17</sup> In particular, both were introduced in response to a serious and imminent threat to national security.<sup>18</sup> Both Bills also made significant changes to Australia's criminal law framework, with important consequences for individual rights. However, there are also important differences between these Bills and their parliamentary scrutiny experiences. While both Bills proceeded through Parliament quickly, the Control Orders Bill was able to attract considerable public and parliamentary attention. For example, the LCA References Committee's inquiry into the Control Orders Bill attracted 294 submissions and 52 second reading speeches.<sup>19</sup> In addition, both the LCA Committee's report and the SSCSB report on the Control Orders Bill were tabled in advance (although only just) of the resumption of the second reading debate.<sup>20</sup> Thus, at least when compared with the other Bills in my case study, the short time between introduction and enactment of the Control Order Bill did not appear to act as a serious impediment to robust parliamentary scrutiny of this Bill.<sup>21</sup> This can be contrasted with the experience of the Foreign Fighters Bill, where neither the PJCHR nor the SSCSB were able to table their reports on the Bill prior to the resumption of the second reading debate and only 46 submissions were made to the PJCIS inquiry. This suggests that, for the Foreign Fighters Bill, the short time between introduction and enactment may have had a negative impact on the scrutiny experience. However, it must also be noted that all of the PJCIS's recommendations with respect to the Foreign Fighters Bill were introduced as successful government amendments, and many of these had important rights-enhancing consequences. As Chapter 5

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<sup>17</sup> Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework' above n 2.

<sup>18</sup> As discussed in Chapter 3, Section D(1) and Chapter 5, Section C(1), for the Control Orders Bill, this was the threat posed by the London Bombing experience; in the case of the Foreign Fighters Bill, the threat concerned the return of Australians following participation in terrorist activities overseas.

<sup>19</sup> Dalla Pozza and Appleby note that this parliamentary debate amounted to 17 hours of parliamentary deliberation. See Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework', above n 2, 281; Gabrielle Appleby, 'The 2014 Counter-Terrorism Reforms in Review' (2015) 26 *Public Law Review* 4.

<sup>20</sup> As noted in Chapter 3, the Bill also required the states and territories to introduce similar laws and thus was proceeded by a COAG process which, through the actions of ACT Chief Minister Jon Stanhope, provided an opportunity for the media and the community to be made aware of the key features of the Bill.

<sup>21</sup> As discussed in Chapter 5, important legislative changes were made to the content of the Anti-terrorism Bill (No 2) 2005 that can be described as rights-enhancing.

notes, the LCA Committee experienced less comprehensive success when it came to influencing legislative change of the Control Orders Bill. These contrasting experiences suggest that, while very short time frames *can* have an influence on the nature and quality of parliamentary scrutiny, they do not necessarily *determine* the strength of the public or legislative impact a committee can have.

The longest periods shown in Table 6.1 also illustrate this point. Both the National Security Legislation Amendment Bill 2010 and the INSLM Bill were before Parliament for around 8–9 months. In many ways, these longer periods are not surprising, as these Bills were not introduced in response to a particular terrorist threat, but rather to a series of reviews of Australia’s counter-terrorism framework. These Bills could also be described as less rights intrusive, and more rights protective, than many of the other case study Acts. However, what is interesting is the fact that the longer time frames provided for scrutiny of these Bills did not result in more submissions to committees, or in additional parliamentary debate. In fact, these Bills received lower than average numbers of submissions, relatively short periods of parliamentary debate and a relatively small number of legislative changes attributable to parliamentary scrutiny. As noted in Chapter 5 and discussed further below, for these Bills, it was the work of previous parliamentary committee inquiries into counter-terrorism laws that proved influential at the pre-legislative phase, rather than the more direct committee scrutiny of their provisions once the Bills had been introduced.

This suggests that factors other than time periods may have an influence on the quality of scrutiny a proposed law receives, and on the rights-enhancing impact a parliamentary committee can have. One of these factors has already been identified as a central theme of my research, that is, the cumulative rights-enhancing effect of multiple committee scrutiny of a particular Bill. Another factor appears to be the extent to which a Bill attracts a range of sophisticated non-government actors to participate in the parliamentary committee process, which in turn increases the volume of public debate on a Bill, and provides important political incentives for parliamentarians to carefully ‘weigh’ competing public interests and policy options when making decisions about a Bill. These two factors are explored further below and set the foundations for a number of reform recommendations set out in Part III.

## C *Influence of Parliamentary Committees on the Public Debate on the Case Study Bills*

### 1 *Parliamentary Debates*

One way to measure the impact of committees on parliamentary debate is to look for direct references to committee work in Hansard debates on the case study Acts. Care must be taken not to overstate the significance of a reference to a committee in parliamentary debates. It is not possible to identify with any precision what a parliamentarian was *actually* thinking when debating a Bill, or what made him or her vote in a certain way. The political reality may be that the parliamentarian was simply reciting a series of dot points circulated by the proponent Minister or Shadow Minister without any independent reflection on the merits of the Bill. Alternatively, a parliamentarian might refer to the work of a committee that they are a member of simply to bolster their own reputation. However, the words deliberately chosen for parliamentary speeches do provide some indication of the type of issues parliamentarians want the public to understand as important in their deliberation on a particular Bill. For these reasons, evidence derived from Hansard debates on the case study Acts provides a useful basis on which to begin to measure public impact in my research.

Table 6.2 provides an overview of the frequency with which the four parliamentary committees studied were referred to during parliamentary debates on the case study Acts. It shows that around three quarters of second reading speeches made on the case study Acts referred to scrutiny undertaken by at least one of the four parliamentary committees studied.



**Table 6.2: References to Parliamentary Committee Scrutiny**

| Bill   | References to parliamentary committee scrutiny  |
|--|---|
| <b>TOTAL</b>   | 262 of 334 speeches (78%)   |
| <b>Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015</b>         | 36 of 41 speeches (90%)<br>36 references to PJCIS, 1 reference to LCA Committees (Greens); 1 reference to PJCHR (Greens)  |
| <b>Australian Citizenship Amendment (Allegiance to Australia) Bill 2015</b>                      | 40 of 68 speeches (60%)<br>40 references to PJCIS, 1 reference to PJCHR (Greens); 1 reference to SSCSB  |
| <b>Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014</b>                      | 19 of 31 speeches (60%)<br>19 references to PJCIS, 3 references to PJCHR, 2 references to LCA Committees being excluded (Greens)                                  |
| <b>Counter-Terrorism Legislation Amendment Bill (No 1) 2014</b>                                  | 12 of 15 speeches (80%)<br>12 references to PJCIS, 3 references to PJCHR  |
| <b>National Security Legislation Amendment Bill 2010</b>   | 15 of 19 speeches (78%)<br>5 references to LCA Committees, 11 references to past inquiries being addressed by this Bill, all of which included reference to PJCIS |
| <b>Independent National Security Legislation Monitor Bill 2010</b>                               | 17 of 21 speeches (80%)<br>7 references to Senate Finance and PA Committee, 10 references to work of past committees  |
| <b>Anti-Terrorism Bill (No 2) 2005</b>   | 24 of 52 speeches (46%)<br>24 substantive references to LCA Committees  |
| <b>National Security Information (Criminal Proceedings) Bill 2004 (Cth)</b>                      | 5 of 5 speeches (100%)<br>5 substantive references to LCA Committees  |
| <b>Anti-terrorism Bill 2004</b>  | 7 of 13 speeches (53%)<br>7 substantive references to LCA Committees  |
| <b>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002</b> | 25 of 36 speeches (75%)<br>25 substantive references to PJC ASIO, 11 substantive references to LCA Committees, 3 references to Scrutiny of Bills                  |
| <b>Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2003</b> | 14 of 23 speeches (66%)<br>14 references to past parliamentary inquiries into the 2002 Bill   |
| <b>Security Legislation Amendment (Terrorism) Bill (No 2) 2002 and Other Bills</b>               | 17 of 27 speeches (62%)<br>17 references to LCA Committees  |

It is clear from Table 6.2 that committees featured prominently in parliamentary debates on the case study Acts. It is also clear that the PJCIS and the LCA Committees received far more references than the PJCHR or the SSCSB, with the PJCIS featuring particularly strongly in the debates since 2013. While opposition and minor parties referred more frequently to parliamentary committees than government members with respect to some Bills<sup>22</sup> it is not uncommon for government members to make substantive references to the work of parliamentary committees in their second reading speeches.<sup>23</sup>

Of interest is the fact that the debate on the two Bills which attracted the highest number of second reading speeches – the Citizenship Bill and the Control Order Bill – contained fewer direct references to the work of parliamentary committees than those Bills that moved through Parliament with much less debate. As will be explored further below, this may be because these Bills invoked strong rights discussions within the broader community, which may have provided incentives for parliamentarians to refer directly to submission makers to the inquiry committees, rather than relying on the reports of the inquiry-based committees themselves. The same trend is apparent with respect to the debates on the ASIO Bill 2002, the ASIO Bill 2003 and the SLAT Bills, which also contained fewer direct references to parliamentary committees. This can be contrasted with the two Bills that attracted the least number of submissions to committee inquiries and lower numbers of second reading speeches: the National Security Information (Criminal Proceedings) Bill 2004 (Cth) and the National Security Legislation Amendment Bill 2010. For these Bills, there was a common deference to the work of parliamentary committees as evidence that the ‘weighing process’ described above had occurred. At both ends of this spectrum, the public impact of parliamentary committees (and in particular the inquiry-based committees) was strong. The inquiry-based committees provided the forum for rights concerns about the Bills to be raised, and parliamentarians were keen to emphasise the importance of the committees undertaking this role (either by deferring to the committee’s report, or quoting directly from the committee’s submission makers) when justifying their position on a particular Bill.

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<sup>22</sup> For example, the Hansard debates on the Control Orders Bill.

<sup>23</sup> For example, the Hansard debates on the Citizenship Bill.

## 2 *Signs of an Emerging Rights-Scrutiny Culture within the Federal Parliament*

An analysis of the parliamentary debates on the case study Acts reveals useful insights into the way the Parliament discusses rights and suggests that a particular rights-scrutiny culture may be emerging that has an important relationship with the mandates of the technical scrutiny committees considered in this thesis. This argument is supported by three compelling observations from the second reading debates on the case study Acts. The first is the propensity for second reading speeches on the case study Acts to include discussions of the need to ‘balance’ competing rights related to the protection of the community from the threat of terrorism, and the individual rights of those affected by the proposed law. For example, of the 334 second reading speeches made on the case study Acts, my analysis suggests that around 70 per cent included some discussion of ‘rights’ and the need to consider these rights in light of competing public interests.<sup>24</sup>

The second compelling observation is the apparent preference for discussing rights with reference to the broad language featuring in the SSCSB’s mandate (such as ‘individual rights and liberties’ and ‘limits on executive power’) as opposed to referring directly to international human rights law (such as ‘Article 14 of the ICCPR’).<sup>25</sup> Interestingly, there was no dramatic increase in references to international human rights concepts following the establishment of the PJCHR, suggesting that, outside of a handful of human rights ‘champions’,<sup>26</sup> the work of the PJCHR was not able to generate a strong response from parliamentarians in the context of debating the case study Acts.<sup>27</sup>

The third compelling observation is the repeated reference to the same types of rights scrutiny principles across the second reading speeches for the 12 case study Acts. These rights and scrutiny principles closely reflect the type of rights analysis found in reports of the committees considered in Chapter 5, and are listed in Appendix E. They include, for example, the principle that:

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<sup>24</sup> Chapter 1, Section A(3) describes what is included in the term ‘rights’ for the purposes of my research.

<sup>25</sup> 232 general rights references (69%); 101 references to international human rights (30%).

<sup>26</sup> These ‘champions’ are discussed further in Chapter 8.

<sup>27</sup> This is consistent with the findings of George Williams and Daniel Reynolds, ‘The Operation and Impact of Australia’s Parliamentary Scrutiny Regime for Human Rights’ (2016) 41(2) *Monash University Law Review* 469.

- The proposed provisions and Explanatory Memorandum should be clearly drafted so the meaning and policy aim is clear to Parliament.<sup>28</sup>
- The expansion of executive power must come with procedural fairness guarantees, including access to legal representation, preservation of common law privileges and access to judicial review.<sup>29</sup>
- New criminal offences should have clearly defined physical and mental elements, allocate the burden of proof to the prosecution, ensure access to legal representation, and not apply retrospectively.<sup>30</sup>
- Any restriction of free speech should be accompanied by exceptions to promote robust debate on matters of public interest.<sup>31</sup>

Taken together, these observations suggest that a particular rights-scrutiny culture may be emerging at the federal level that warrants further documentation and investigation.

Many observers may be sceptical of the value of this emerging rights-scrutiny culture, noting for example that common references to ‘balancing’ in parliamentary debates are not reliable evidence that meaningful deliberation has taken place or that less rights-intrusive means of achieving the same policy end have been considered.<sup>32</sup> In some instances, they argue, it is just part of the standard political rhetoric used by both major parties to ‘soften’ or ‘hide’ the rights-

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<sup>28</sup> See, eg, LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) Recommendations 1 and 2.

<sup>29</sup> See, eg, LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 4; LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) ch 3 (key issues summarised at [3.22]); SSCSB, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

<sup>30</sup> See, eg, Anti-Terrorism Bill (No 2) 2005, Schedule of the amendments made by the Senate, Items 68–72; SSCSB, Parliament of Australia, *Alert Digest No 13 of 2005* (9 November 2005) 8, 14–16; SSCSB, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

<sup>31</sup> See, eg, SSCSB, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015) 3, 10; LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) Recommendations 27 and 28, see also ch 5 ‘Sedition and Advocacy’; LCA Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

<sup>32</sup> See, eg, George Williams, ‘Losing Our Balance in Fortress Australia’ *Australian Financial Review*, 23 September 2005; Jude McCulloch, ‘Human Rights and Terror Laws’ (2015) 128 *Precedent* 26, 28.

intrusive nature of the laws they are enacting.<sup>33</sup> However, my research points to an interesting relationship between the repeated reference to ‘balancing’ and the nature of the parliamentary committee scrutiny of the Bill.<sup>34</sup> The more popular the committee inquiry leading up to the second reading debate, the more confident parliamentarians appear to be in asserting that the ‘right balance has been struck’. There is also a strong relationship between (a) those Bills that attract a large number of submission makers to parliamentary inquiries and (b) those Bills that attract the most significant references to rights concepts in parliamentary debates. This suggests that, when the Parliament talks about the work of its committees, it is more likely to discuss ‘rights’ and is more explicit about the need to strike the right ‘balance’ when enacting counter-terrorism laws. Further, as established in Chapter 5, where multi-committee scrutiny occurs, there is also a strong chance that it will result in meaningful rights-enhancing legislative change. This suggests that some form of meaningful rights scrutiny took place, at least with respect to the case study Acts, that could be improved and built upon.

Others may consider that I am presenting an overly optimistic view of the rights-scrutiny culture in the federal Parliament, particularly since the election of the Abbott government.<sup>35</sup> For example, for Carne, the Brandis-led shift away from international human rights discourse towards the language of individual freedoms points to ‘a renewed and deliberate distinctiveness and differentiation in Australian human rights policy and practice’<sup>36</sup> that has ‘proven grossly

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<sup>33</sup> This view was also supported by some of the interview material. For example, the Council for Civil Liberties said that often the lack of a clear analytical framework being applied when parliamentarians speak of ‘balance’ leaves submission makers and the public more broadly cynical about their commitment to genuinely looking for ways to avoid disproportionate interferences with individuals’ rights: Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016). See also Interview with Bret Walker SC, former Inspector General of Intelligence and Security (Sydney, 30 May 2016); Interview with Nicholas Cowdery, former Human Rights Advisor to the Law Council of Australia (Sydney, 30 May 2016).

<sup>34</sup> For an example of the challenges associated with legal ‘balancing’ of rights from the perspective of the courts, including consideration of the use of the proportionality approach when considering the implied freedom of political communication, see Shipra Chordia, ‘The problem of balancing: structured proportionality and tiered scrutiny’, Harvard Law School Visiting Scholar Colloquium Series, Harvard Law School, Cambridge, 30 November 2016.

<sup>35</sup> See, eg, Carolien van Ham and Louise Chappell, ‘Democracy and human rights: a tripartite conceptual framework’ (2017) 23(2) *Australian Journal of Human Rights* 143, 166–7; Greg Carne, ‘Re-Orientating Human Rights Meanings and Understandings? Reviving and Revisiting Australian Human Rights Exceptionalism Through a Liberal Democratic Rights Agenda’ (2015) 17(1) *Flinders Law Journal* 61.

<sup>36</sup> Carne, above n 35, 65.

ineffectual in offering substantive review and critique of far reaching 2014 terrorism law reform provisions'.<sup>37</sup>

Before conducting this research, I shared Carne's concerns that the 'liberal democratic rights agenda' promoted by Attorney-General Brandis would dilute rights scrutiny at the federal level and impact negatively on the human rights literacy of the Parliament. However, as discussed further in Part III, my research challenges Carne's assumptions on a number of fronts. First, my research demonstrates that the counter-terrorism laws debated and enacted during 2013–14 attracted a rights discourse that moved beyond the 'liberal democratic rights agenda', both within the Parliament and within the broader media commentary on the laws. This discourse included, for example, reliance on specific human rights analysis undertaken by the PJCHR by influential submission makers to other parliamentary committees, as well as a focus by the PJCIS and SSCSB on issues such as appropriate parliamentary oversight of the use of executive power and the impact of the law on religious or ethnic minorities.<sup>38</sup> Secondly, my research demonstrates that short time periods for parliamentary review are not necessarily fatal when it comes to improving the rights compatibility of proposed counter-terrorism laws, particularly when inquiry-based committees are still able to conduct extensive public hearings, and submission makers and parliamentarians have access to scrutiny committee reports.<sup>39</sup> Finally, my research demonstrates that during 2013–14, the PJCIS had a 100 per cent 'strike rate' in terms of translating its recommendations into legislative amendments, and the vast majority of these amendments were rights-enhancing in nature (even if they did not remedy the full range of rights concerns with the Bills).

Thus, while rights advocates may be correct to hold concerns about the scope of the 'liberal democratic rights agenda' promoted by the Abbott Government, my research suggests that this 'agenda' has not prevented the development of a particular rights-scrutiny culture at the federal level that could, if documented and investigated further, be useful for identifying what type of reforms will be most successful at improving rights protection in Australia.

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<sup>37</sup> Ibid 67.

<sup>38</sup> For further information see Appendix E.

<sup>39</sup> As noted above, in the case of the Foreign Fighters Bill, my research found that parliamentary scrutiny of the Bill was undermined by the failure of the PJCHR to table its report on the Bill prior to the commencement of the second reading debate on the Bill.

In addition, understanding this emerging rights-scrutiny culture could help to distinguish between what Orr and Levy describe as the difference between ‘conceptual balancing’ (which often takes the form of trading off values or interests against others) and ‘deliberative accommodation’ (which often involves searching for a common ground between different values or interests).<sup>40</sup> For these authors, deliberative accommodation methodologies are preferable to conceptual balancing approaches as they encourage a broader range of views to be heard, involve mutual learning and persuasion and depend on inclusiveness, rather than ‘trade offs’ between rights holders.<sup>41</sup> My research suggests that, when working together as a system, parliamentary committees may be beginning to show signs of ‘deliberative accommodation’, at least in the context of reviewing the case study Acts. As discussed further in Part III, understanding this emerging rights-scrutiny culture could also help contextualise what Stephenson has described as the ‘institutional disagreements’ that occur on rights issues within the federal jurisdiction, which could in turn help to identify options for improving Australia’s parliamentary model of rights protection.<sup>42</sup>

#### D *Media Commentary*

The final snapshot of public impact being considered in this chapter is media commentary on the case study Bills. Table 6.3 lists references to the work of committees in media commentary on the case study Acts, found through searches of an Australian media database.<sup>43</sup> While this is by no means a comprehensive catalogue of the public commentary on counter-terrorism law

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<sup>40</sup> Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 76-80.

<sup>41</sup> Ibid, 80, 197. While Orr and Levy’s work focuses on what they call ‘second order’ issues in deliberative democracy, such as the role the judiciary and lawyers play in the design and operation of the electoral system, their analysis of how deliberative democratic values can improve the quality of public decision making holds lessons for the work of parliamentary committees, see 197-200.

<sup>42</sup> Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 8.

<sup>43</sup> The database used for this purpose was the Australia/New Zealand Reference Centre accessed through the University of Adelaide Library. This database is supported by EBSCO Host and provides access to Australian and New Zealand newspapers, magazines, and radio and television transcripts. Searches were also undertaken on ‘Google’ with the ‘News’ tab ‘Australia only’ selected. The time period set for these searches was 2001–16. Media articles referring to the case study Acts during this time period are set out in Appendix C.

making in Australia,<sup>44</sup> it provides a glimpse into the extent to which parliamentary committee work featured in the broader public debate on the Bills.

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<sup>44</sup> For example, Table 6.3 does not show the very large volume of media and academic commentary that refers in general terms to Australia's response to terrorism, or that documents or discusses particular local and international terrorist events or threats. Even a cursory examination of this volume of material reveals that articles or reports referring to parliamentary scrutiny of proposed new counter-terrorism measures comprise a small minority. This must be kept in mind when evaluating the public impact of the parliamentary committee system on the public debate on these laws.



**Table 6.3 Public Commentary on the Case Study Bills and the Role of Parliamentary Scrutiny (References Provided in Appendix C)**

|   | Media articles                                       | Reference to parliamentary scrutiny   | Reference to rights issues   |
|---|--|---|--|
| <b>Security Legislation Amendment (Terrorism) Bill 2002 (No 2) and Other</b>            | 18 <i>NB some cross over with ASIO Bills (below)</i> | Yes, references to LCA Committees, also criticism of legislative process  | Yes, focus on procedural rights, freedom of association, freedom of speech   |
| <b>ASIO Legislation Amendment (Terrorism) Bill 2002 and 2003</b>                        | 39 <i>NB some cross over with SLAT Bills (above)</i> | Yes, extensive references to LCA Committees' and PJC ASIO Committee's inquiries, including quotations from submission makers and recommendations. | Yes, extensive discussion of rights and civil liberties including specific references to right to free speech, rights of children, access to legal representation, incommunicado detention |
| <b>Anti-Terrorism Bill 2004</b>   | None found   |   |  |
| <b>National Security Information (Criminal Proceedings) Bill 2004</b>                   | 11   | Yes, references to LCA Committees   | Yes, strong focus on procedural rights, eg right to access legal representation, open justice  |
| <b>Anti-Terrorism Bill (No 2) 2005</b>  | Over 200 <i>NB including after enactment</i>         | Yes, references to work of LCA Committees   | Yes, extensive discussion of rights issues, including reference to international human rights law  |
| <b>National Security Legislation Amendment Bill 2010</b>                                | 10 <i>NB most focused on Haneef Inquiry</i>          | Yes, references to past reviews including by PJCIS, LCA Committees but more commonly to Haneef Inquiry  | Yes, in general terms and with reference to the Haneef case.   |
| <b>Independent National Security Legislation Monitor Bill 2010</b>                      | 10   | Yes, references to SCFPA but also PJCIS and Sheller Committee   | Yes, with particular reference to 'balancing' rights and national security   |
| <b>Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014</b>             | 33   | Yes, references to PJCIS and 'Senate Committees' examining the Bill. NB also reference to INSLM and IGIS  | Yes, particular reference to procedural fairness and fair trial principles, freedom of movement  |
| <b>Counter-Terrorism Legislation Amendment Bill (No 1) 2014</b>                         | None found   |   |  |
| <b>Telecommunication (Interception and Access) Amendment (Data Retention) Bill 2014</b> | Over 250   | Yes, some references to both PJCIS and LCA Committees   | Yes, particularly strong and repeated references to right to privacy   |
| <b>Citizenship Amendment (Allegiance to Australia) Bill 2015</b>                        | 126  | Yes, frequent references to work of PJCIS and INSLM   | Yes, including specific references to procedural fairness, legal right to access citizenship, indefinite detention, freedom of speech, right to equality                                   |

Table 6.3 largely confirms the trends described above with respect to the parliamentary debates on the case study Acts. For example, the Control Orders Bill, the Data Retention Bill and the Citizenship Bill all received high levels of media attention, and public commentary on these Bills included regular references to rights issues, as well as references to parliamentary scrutiny processes.<sup>45</sup> These Bills also attracted large numbers of submission makers to committee inquiries and, in the case of the Control Orders Bill and the Data Retention Bill, were scrutinised by at least three separate committees. This suggests that there is a causal relationship between the rights-engaging nature of the content of the Bill, the number of submissions a committee inquiry attracts, and the rate of media attention a Bill receives. The interviews I conducted for my research also suggest that often it is the referral of a Bill to a committee for inquiry that provides important trigger points for public advocacy by sophisticated submission makers.<sup>46</sup> This can include direct media engagement by these bodies in order to highlight the rights issues arising from the Bill.<sup>47</sup>

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<sup>45</sup> For media coverage of the Anti-Terrorism Bill (No 2) 2005 see, eg, on control orders, citizenship and data retention Justice John Von Doussa, 'Human Rights Chief Says Anti-terrorism Laws Could Make Courts Unfair', *Canberra Times*, 15 October 2005; Elizabeth Evatt, 'Heavyweights Unite in Call for More debate', *Sydney Morning Herald*, 25 October 2005, 1; International Commission of Jurists Australia, 'ICJ Australia Denounces New Counter-Terrorism Laws' (Media Release, 17 October 2005); Law Society of New South Wales, 'Government Abuses Power Over Anti-Terrorist Laws' (Media Release, 14 October 2005). For media coverage of the Data Retention Bill see, eg, Emma Griffiths, 'Data Retention: Access to Journalists' Records to be Tougher Under Deal Between Government and Labor Party', *ABC News* (online), 19 March 2015 <<http://www.abc.net.au/news/2015-03-19/access-journalists-records-tougher-data-retention-deal/6331904>>; Katie Miller, 'Why the Data Retention Legislation Should be Withdrawn', *Australian Financial Review* (online), 2 March 2015 <<http://www.afr.com/technology/web/why-the-data-retention-legislation-should-be-withdrawn-20150227-13qufg#ixzz4kdXl5wER>>; Allie Coyne, 'Govt to Adopt All Changes to Data Retention Bill', *IT News* (Australia, online), 3 March 2015 <<https://www.itnews.com.au/news/govt-to-adopt-all-changes-to-data-retention-bill-401177>>. For media coverage of the Citizenship Bill see, eg, Emma Griffiths, 'Bill Shorten Gives Qualified Backing to Stripping Terrorists of Citizenship', *ABC News* (online), 4 June 2015 <<http://www.abc.net.au/news/2015-06-04/shorten-indicates-labor-will-support-citizenship-changes/6521600>>; Sangeetha Pillai, 'Committee Recommendations Improve Citizenship Bill, but Fundamental Flaws Remain', *The Conversation* (online), 7 September 2015 <<http://theconversation.com/committee-recommendations-improve-citizenship-bill-but-fundamental-flaws-remain-45720>>; Australian Human Rights Commission, 'Commission Responds to Citizenship Bill' (Media Release, 7 September 2015). For further examples see Appendix C.

<sup>46</sup> See, eg, Interview with Kris Klugman and Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016); Interview with Simon Henderson, Law Council of Australia (Canberra, 23 May 2016); Interview with Nicola McGarrity, Gilbert & Tobin Centre for Public Law (Sydney, 31 May 2016).

<sup>47</sup> See, eg, David Wroe, 'Law Council Blasts New Citizenship Terrorism Laws as Much Too Broad', *The Sydney Morning Herald* (online), 26 June 2015 <<http://www.smh.com.au/federal-politics/political-news/law-council-blasts-new-citizenship-terrorism-laws-as-much-too-broad-20150626-ghyqqx.html>>; Civil Liberties Australia, 'Need for Proposed Anti-terror Laws Still Unexplained' (Media Release, 28 September 2005); Sangeetha Pillai, 'Bill Targets Foreign Fighters Before departure and After Return', *The Conversation* (online), 24 September 2014 <<http://theconversation.com/bill-targets-foreign-fighters-before-departure-and-after-return-30095>> (at the time of publication Sangeetha Pillai was a PhD researcher in citizenship and constitutional law at the Gilbert + Tobin

A similar experience can be observed with respect to the SLAT Bills and the ASIO Bills, as well as the Foreign Fighters Bill, which all generated significant media attention.<sup>48</sup> In the case of the SLAT and ASIO Bills, the media commentary included strident criticism of the proposed new measures containing references to human rights principles, rule of law principles and comparative examples.<sup>49</sup> The speed at which these laws were ‘pushed through’ Parliament was also frequently noted, although the work of the LCA Committees was praised and submissions to those committees frequently quoted.<sup>50</sup> This again suggests that the conduct of public inquiries by parliamentary committees, particularly those involving large numbers of sophisticated non-government submission makers, helps to generate strong media interest in the Bill.

This relatively strong media interest may also help explain the rights-enhancing nature of the legislative amendments made to the Bills noted above that can be attributed to the work of parliamentary committees. This is supported by interviews conducted for this thesis, which suggest that public statements by reputable submission makers about the rights concerns arising from a proposed Bill can provide useful ‘cover’ for backbenchers or non-government members to push for their respective parties to give effect to rights-enhancing committee recommendations by way of legislative amendment.<sup>51</sup>

Despite these persuasive examples, it is clear that there is not always a causal relationship between the rights-engaging nature of the Bill, the popularity of the committee inquiry and the level of media attention generated. For example, the Anti-Terrorism Bill 2004 attracted very

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Centre of Public Law at UNSW; Law Council of Australia, ‘Law Council’s Outrage at One Week Review for Anti-Terror Laws’ (Media release, 14 October 2005). For further examples see Appendix C.

<sup>48</sup> ‘ASIO Law Fears’, *The Daily Telegraph* (Sydney), 21 February 2002, 8; ‘Will the Terrorism Bill Allow Government Terrorism’, *The Age* (Melbourne), 17 April 2002, 12; Shaya Laughlin, ‘Australia’s New Foreign Fighter Laws Scared Son’, *The Gold Coast Bulletin* (Brisbane), 7 February 2015, 5. For further examples see Appendix C.

<sup>49</sup> See, eg, ‘Other Threats to Freedom’, *The Sydney Morning Herald* (Sydney), 28 November 2002, 12; Brendan Nicholson, ‘Protect Our Values, Giorgio Urges’, *The Sunday Age* (Melbourne), 29 September 2002, 6. For further examples see Appendix C.

<sup>50</sup> See, eg, ‘Flaws in Terror Laws Exposed’, *The Courier Mail* (Brisbane), 11 May 2002, 22; Linda Kirk, ‘Balance Terror Fight and Liberties’, *The Advertiser* (Adelaide), 23 December 2002, 18. For further examples see Appendix C.

<sup>51</sup> See, eg, Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

little media attention when introduced, despite introducing rights-intrusive new powers including the so called ‘dead time’ provisions in Part IC of the *Crimes Act 1915* (Cth), which permitted the police to detain a person (potentially incommunicado) who may have relevant information about terrorist activities for extensive periods without charge. These provisions appeared to ‘slide under the radar’ at the time the Bill was introduced, only to attract much more significant media and academic attention in subsequent years (sparked by the Haneef case and the subsequent inquiry).<sup>52</sup> This suggests that rights-engaging provisions may not always attract media and submission maker attention at the time of introduction. Something more may be needed (such as the opportunity to observe the laws in action) before media attention will occur.

Another interesting example is the National Security Information (Criminal Proceedings) Bill 2004. Despite only attracting a relatively modest number of submissions and second reading speeches in Parliament, this Bill managed to attract stronger than expected media attention.<sup>53</sup> This could be explained by the concerted ‘campaign’ against the Bill developed and prosecuted by legal organisations and journalists, both of whom had direct interests in drawing attention to the provisions of the Bill that would restrict their professional roles in terrorist-related trials. In the case of the legal organisations, it was the proposal to ‘security clear’ lawyers that generated particular concern, as well as the ‘closed court’ provisions that aimed to protect national security information from disclosure in criminal trials.<sup>54</sup> This example underscores the

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<sup>52</sup> See, eg, ‘The Haneef Affair: From Arrest to Inquiry’, *ABC News* (online), 2 July 2010 <<http://www.abc.net.au/news/2008-10-15/the-haneef-affair-from-arrest-to-inquiry/542576>>; Chris Hammer, ‘Haneef Case Weak, FOI Papers Show’, *The Age* (online), 16 May 2008, <<http://www.theage.com.au/news/national/haneef-case-weak-foi-papers-how/2008/05/15/1210765057432.html>>; George Williams, ‘Time to Change Terrorism Laws’, *The Sydney Morning Herald* (online), 24 February 2009 <<http://www.smh.com.au/federal-politics/time-to-change-terrorism-laws-20090223-8fr1.html>>. For further examples see Appendix C.

<sup>53</sup> See, eg, Cynthia Banham and Nick O’Malley, ‘Rights at Risk in Security Crackdown’, *The Sydney Morning Herald* (Sydney), 6 September 2005, 2; Patrick Walters, ‘Press Lobby Wins Reforms to National Security Crime Bill’, *The Australian* (National), 12 September 2004, 17; Brendan Nicholson, ‘Government Eases Secrecy of Terrorist Trial Evidence’, *The Age* (Melbourne), 12 March 2004, 4. For further examples see Appendix C.

<sup>54</sup> See, eg, Law Council of Australia, Submission to Senate Legal and Constitutional Committee, *National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential amendments) Bill 2004* (2 July 2004); Law Council of Australia, Submission to Australian Law Reform Commission, *Inquiry into Protecting Classified and Security Sensitive Information* (12 September 2003); Law Council of Australia, Submission to the United Nations Human Rights Committee, *Shadow Report to Australia’s Common Core Document* (29 August 2008).

role that sophisticated submission makers play in generating media attention on proposed laws, which is frequently triggered by the referral of the Bill to an inquiry-based committee.

With these findings in mind, it is unsurprising that the inquiry-based committees dominate media references to committees in Table 6.3, as these are the committees that provide the forum for submission makers to publicly articulate their concerns about a proposed law. Inquiry-based committees also provide a forum for parliamentarians to directly question the proponents of a Bill, often adding an element of drama to the public hearing experience that is of interest to the media. The technical scrutiny committees are very rarely referred to in media commentary on the Bills; however, this does not mean that their analysis is completely absent from the public discourse. Table 6.3 suggests that public commentary on the case study Bills almost invariably included references to rights, and in particular the need to ‘balance’ competing rights or public interests or to ensure oversight and safeguards to protect rights. In many instances, broad reference was made to international human rights law principles or the principles applied by the SSCSB. This could suggest that the scrutiny criteria being applied by the technical scrutiny committees resonated to some degree within the public commentary on the Bills. However, it may also be explained by the fact that sophisticated submission makers regularly focus on rights issues, and the public commentary simply reflects their concerns. In either case, as Chapters 4 and 5 suggest, the provision of rights-related analysis of a Bill by the SSCSB and the PJCHR appears to assist submission makers to justify and articulate their concerns about a proposed law, which in turn appears to inform the rights-related discussions that occur within the inquiry-based committees and in the public commentary on the law. These different strengths and weaknesses between the inquiry-based and technical scrutiny committees are considered in detail in Chapter 8, and help inform the recommendations made in Part III of my research.

### *E Influence of Formal Parliamentary Scrutiny on Post-Enactment Review of the Case Study Bills*

The final area of public impact considered in this chapter is the role parliamentary committees play in post-enactment review of the case study Acts. Looking for this form of public impact helps to identify whether parliamentary committees are having a longer-term impact on the content of the case study Acts. For example, the LCA Legislation Committee’s recommendations with respect to the Control Orders Bill relating to the proposed new sedition

offences featured prominently in the ALRC's report *Fighting Words: A Review of Sedition Laws in Australia*,<sup>55</sup> and then later in parliamentary debate on the National Security Legislation Amendment Bill 2010, which implemented a number of the ALRC's recommended reforms.<sup>56</sup>

Another example is the 2006 Sheller Review,<sup>57</sup> which drew upon the work of the LCA Legislation Committee and the PJC on ASIO, ASIS and DSD in their inquiries into the SLAT Bills, the ASIO Bills and the Control Orders Bill. For example, in line with the recommendations made by these committees, the Sheller Review recommended that the process for proscribing a terrorist organisation be made more transparent by providing persons affected with notification and the right to be heard in opposition.<sup>58</sup> It also recommended that the term 'threat of action' be removed from the definition of 'terrorist act',<sup>59</sup> the advocating terrorism offence be narrowed,<sup>60</sup> the offence of 'associating with terrorist organisations' be repealed,<sup>61</sup> and consideration be given to the establishment of a Special Advocate and/or Public Interest Monitor. The Rudd Government later referred to the recommendations made by the Sheller Committee as the basis for a number of the provisions contained in the *National Security Legislation Amendment Act 2010* (Cth).

The work of parliamentary committees also featured in the 2008 Haneef Report,<sup>62</sup> with Mr Clarke echoing concerns raised about the relevant provisions of Part IC of the *Crimes Act 1915*

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<sup>55</sup> ALRC, *Fighting Words: A review of sedition laws in Australia*, Report No 104 (2006). As noted in Chapter 5, the key recommendations of the ALRC included that the term 'sedition' be removed from federal criminal law (Recommendations 1, 2 and 3) and that changes be made to the advocating terrorism and sedition offences introduced by the Control Orders Bill to ensure that there is a 'bright line distinction' between offending conduct and freedom of expression (Recommendation 9).

<sup>56</sup> LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005). The LCA Committee's report on the Control Orders Bill also featured prominently in the following inquiries into counter-terrorism laws: Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6; COAG, *Review of Counter Terrorism Legislation* (2012); Bret Walker, *Independent National Security Legislation Monitor: Annual Report 2011* (2011); PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006).

<sup>57</sup> Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 6.

<sup>58</sup> *Ibid* Recommendation 3.

<sup>59</sup> *Ibid* Recommendation 7.

<sup>60</sup> *Ibid* Recommendation 9.

<sup>61</sup> *Ibid* Recommendation 15.

<sup>62</sup> Mark John Clarke, *Report of the Inquiry into the Case of Dr Mohamed Haneef, Volume One* (2008).

(Cth) by the LCA Legislation Committee in its inquiry into the Anti-Terrorism Bill 2004.<sup>63</sup> The Haneef Report also recommended that consideration be given to the appointment of an Independent Reviewer of counter-terrorism laws.<sup>64</sup> As discussed above, the government gave legislative effect to some of these recommendations in the *National Security Legislation Amendment Act 2010* (Cth) and the *INSLM Act 2010* (Cth).

The 2012 COAG Review of Counter Terrorism Legislation<sup>65</sup> also referred to past parliamentary committee scrutiny of the control order and preventative detention order regimes.<sup>66</sup> The COAG Committee recommended 47 changes to a range of counter-terrorism provisions subject to the review, many of which reflected the recommendations previously made by parliamentary committees.<sup>67</sup> Although the government only supported a handful of the COAG Committee recommendations, the recommendation for the introduction of a nationwide system of ‘Special Advocates’<sup>68</sup> to participate in control order proceedings later found its way into the PJCIS’s report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2014.<sup>69</sup>

The above examples demonstrate that the scrutiny work undertaken by the four parliamentary committees studied had an influence on post-enactment reviews of counter-terrorism laws, which in turn were at least moderately effective at making rights-enhancing changes to the content of the case study Acts. This supports the finding made earlier in this chapter that parliamentary committees appear to play an important supportive role in the broader public

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<sup>63</sup> Ibid 242–3.

<sup>64</sup> Ibid Recommendation 4.

<sup>65</sup> COAG, *Review of Counter Terrorism Legislation* (2012). The legislation covered by the COAG Review included divs 101, 102, 104 and 105 of the *Criminal Code Act 1995* (Cth), s 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) and ss 3C, 3D and Division 3A of the *Crimes Act 1914* (Cth) as well as a range of corresponding state and territory laws.

<sup>66</sup> Ibid. Eg 33 references were made to the work of the PJCIS, with much less frequent reference being made to the LCA Committees. Other independent post-enactment reviews were also discussed, including the Sheller Review.

<sup>67</sup> Ibid. For example, the COAG Committee recommended changes to clarify and narrow the scope of the definition of ‘advocates’ in the advocating terrorism offence in s 102.1(1A) of the Criminal Code (Recommendation 13). The LCA Committee (Recommendation 31) made a similar recommendation in its report on the Control Orders Bill. The COAG Committee also recommended the removal of strict liability elements in the terrorist organisation offences (Recommendation 18), similar to recommendations made by the LCA Committee in its report on the SLAT Bills (Recommendations 3 and 4).

<sup>68</sup> Ibid Recommendations 13.

<sup>69</sup> Ibid Recommendations 19–24.

debate on how to ‘strike the right balance’ when it comes to counter-terrorism laws. As noted above, the contribution each committee makes to the public debate on the case study Acts may not always be immediately apparent and depends on their particular strengths and characteristics. As discussed further below, I argue that capitalising on these different strengths of individual committees within the system, and encouraging multi-committee collaboration, is the key to improving the rights-protecting capacity of the parliamentary committee system.

## F *Summary of Findings on Public Impact*

By looking at the influence of parliamentary committees on parliamentary debates, media commentary and post-enactment review it is possible to get a glimpse of the broader impact of the committee system on the case study Acts. The above analysis shows that, when the committee system provided genuine opportunities for public hearings to be conducted into the case study Acts, the public impact was considerable, particularly when sophisticated submission makers who had the capacity to generate media attention participated. This in turn provided strong incentives for parliamentarians to engage with rights issues and discuss committee inquiries when debating the relevant Bill. This is apparent in the LCA Committees’ and PJCIS’s inquiries into the most controversial case study Acts, such as the ASIO Bills, the Control Order Bill and the Citizenship Bill, but also in the context of less controversial Bills, such as the National Security Information (Criminal Proceedings) Bill 2004.

The above analysis also demonstrates that the public impact of committee work can occur many years after enactment, as evident in the reports and recommendations of the post-enactment review bodies discussed above. This suggests that committee recommendations for legislative amendment that were rejected or ‘slipped under the radar’ at the time of initial scrutiny can be revived by post-enactment review, providing the committee system with a second chance to influence the shape and operation of these laws.

This chapter also considered whether the time allocated for parliamentary scrutiny of the case study Acts determined the quality of scrutiny undertaken. The results suggest that, while tabling committee reports prior to the conclusion of the second reading debate on a Bill *is* critical if a committee is to have an immediate influence on the content of the Bill, short time frames for scrutiny do not necessarily negate the potential for rights-enhancing legislative and public impacts. In particular, the examples discussed above suggest that large public inquiries can take place in short periods, which can in turn generate robust parliamentary debate and strong



media attention, and give rise to rights-enhancing legislative change. While this type of ‘fast and furious’ scrutiny could be particularly problematic for less well-resourced submission makers,<sup>70</sup> it suggests that timing might not be everything when it comes to rights scrutiny of proposed laws.

Finally, this chapter identifies that, when it comes to debating proposed counter-terrorism Bills in the Parliament and the media, there is a positive relationship between the work of the four parliamentary committees studied and the consideration of a particular range of rights and other scrutiny principles. While it may be too early to tell whether this collection of rights and scrutiny principles resonates across other subject areas, I argue that the development of this rights-scrutiny culture is a relevant factor to consider when identifying options to improve Australia’s parliamentary model of rights protection.

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<sup>70</sup> See, eg, discussion in Chapter 4 about the challenges faced by less experienced organisations seeking to participate in parliamentary committee inquiries. See also Interview with Lydia Shelly, Muslim Legal Network (telephone, 2 June 2016).

## CHAPTER 7: HIDDEN IMPACT

### *A Why Look for Hidden or Behind-the-Scenes Impact of Parliamentary Committees?*

Chapter 7 of this thesis sets out evidence of the *hidden* or *behind-the-scenes* impact of the four parliamentary committees on the case study Acts. As noted in Chapter 2, ‘hidden impact’ means the role a parliamentary committee, or the system of committees, plays in the pre-introduction development of a Bill. This type of impact is described as ‘hidden’ as it often occurs prior to a Bill being introduced into Parliament and concerns the activities of public servants and parliamentary counsel, outside of the public gaze.

Evidence of hidden impact can take the form of publicly available materials published by the government and its departments to guide policy development and ensure consistency in legislative drafting. This provides an insight into the extent to which public servants are required or encouraged to have regard to the work of parliamentary committees when undertaking their work. However, documentary evidence alone is unlikely to provide a clear sense of whether public servants are *actually* having regard to the work of parliamentary committees. This requires a more subjective analysis. In my research this was achieved by interviewing key participants in the law-making process.<sup>1</sup>

Looking for hidden impact is particularly relevant when considering the parliamentary committee system’s contribution to rights protection in Australia. This is because, for many commentators, the best opportunity to effect rights-enhancing change within an exclusively parliamentary model of rights protection is at the pre-introduction stage.<sup>2</sup> As noted in Chapter 1, once a Bill has been introduced into Parliament, the proponent Minister has made a public

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<sup>1</sup> As noted in Chapter 2, as part of this research, I interviewed public servants who were directly responsible for developing or drafting the case study Bills, including those from the AGD, Department of Immigration and Border Protection (DIBP), AFP and OPC. I also conducted interviews with current and past parliamentarians and parliamentary staff. Although not statistically representative, these interviews provide a useful insight into the role parliamentary committees play in the development of proposed laws from the perspective of a broad range of players in the legislative development and drafting process. Further information about the interviews is set out in Appendix A.

<sup>2</sup> See, eg, Janet Hiebert, ‘Parliamentary Engagement with the Charter’ (2012) 58 *Supreme Court Law Review* 87. See also discussion in Chapter 1.

political commitment to its policy objectives that can be very hard to shift even in the face of compelling arguments about the Bill's negative rights consequences.<sup>3</sup> Conversely, a proposed Bill can be adjusted to lessen the potential rights impact or to improve rights protection at the pre-introduction stage with far less political risk for the proponent. Pursuant to this approach, the people best able to achieve this rights-enhancing change are those working behind the scenes such as public servants or parliamentary counsel, rather than those involved in the post-introduction public debate on the Bill, who are necessarily curtailed by the political realities of the day. This behind-the-scenes rights-enhancing change is sometimes described as a 'culture of rights compliance' and is seen by some as a key component of successful rights protection.<sup>4</sup>

The hidden impact of the parliamentary committees also has important implications for the tension described in Chapter 4 relating to the legitimacy attributed to different types of parliamentary committees. For example, my research finds that an inquiry-based parliamentary committee that attracts a high rate of participation will be in the minds of those responsible for developing and implementing legislation, and prudent proponents of Bills will adopt strategies to anticipate or avoid public criticism by such committees. In this way, the inquiry-based committees may have a strong 'hidden impact' on the development of laws. My research also shows that the 'technical scrutiny' committees, and in particular the SSCSB, may also generate a strong hidden impact – not because of their capacity to generate public interest, but rather because the scrutiny criteria the SSCSB applies is entrenched in the practices of public servants and parliamentary counsel. In other words, the SSCSB commands political authority among this category of key participants precisely because it is seen to be removed from the political discourse on the Bill.

Understanding these different forms of 'hidden impact' helps uncover new opportunities to improve the rights-protecting capacity of the committee system, in addition to exposing some

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<sup>3</sup> See, eg, Janet Hiebert, 'Legislative Rights Review: Addressing the Gap between Ideals and Constraints' in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 39, 52; David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1, 7; David Feldman, 'Democracy, Law and Human Rights: Politics as Challenge and Opportunity' in Murray Hunt et al (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015) 95, 108.

<sup>4</sup> See, eg, Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights in Australia* (Lawbook Co, 2013) 37, 59; Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Paper presented in the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 8 December 2006).

of the system's key challenges and weaknesses. In particular, as discussed further in Part III, the findings in this chapter warn against reforms that radically alter the features of the committee system that currently resonate strongly with those responsible for developing and drafting proposed laws. For this reason, I argue that, instead of relying on one particular committee, such as the PJCHR, to generate a culture of rights compliance among law makers at the federal level, it may be more useful to consider how the *system* of parliamentary committees could be adjusted or changed to encourage rights considerations at the pre-introduction stage.

## B *Documentary Evidence*

As noted above, the behind-the-scenes impact of parliamentary committees is evident from explicit references to parliamentary committees or their scrutiny criteria in guidance and other materials prepared for those public servants directly engaged in developing and drafting proposed laws. For example, the *Legislation Handbook*<sup>5</sup> provides a summary of the legislative process, beginning from submitting a legislative proposal for consideration and ending with passage through Parliament, and is an authoritative source of guidance for public servants. The *Legislation Handbook* also contains a number of explicit references to the work of parliamentary committees and the scrutiny criteria they apply. For example, it explicitly refers to parliamentary committees when describing the consultation required when developing legislation<sup>6</sup> and when highlighting specific matters for consideration, such as whether the proposed Bill includes changes to criminal law principles<sup>7</sup> or departures from Australia's international human rights obligations.<sup>8</sup> The sections of the *Legislation Handbook* relating to the preparation of Explanatory Memoranda and SoCs also include references to parliamentary committees,<sup>9</sup> as do the sections describing a Bill's journey through Parliament. For example,

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<sup>5</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (February 2017) <<https://www.dpmc.gov.au/resource-centre/government/legislation-handbook>>.

<sup>6</sup> Ibid 1.

<sup>7</sup> Ibid 29.

<sup>8</sup> Ibid 31.

<sup>9</sup> Ibid 43–4. For example, the *Legislation Handbook* provides that officers involved in preparing Explanatory Memoranda should be aware of the SSBSC's scrutiny mandate and ensure that '(a) the policy and legislative background are explained so that the reason and intent of a bill/provision or amendments are clear; and (b) examples of the intended effect of a clause or the problem it is intended to overcome are provided wherever

the *Legislation Handbook* warns that, if a Bill is referred to a committee, ‘departments will need to be available to provide background briefing and factual information to the minister or the committee. This could include advice on any possible amendments to the bill and to progress preparation of amendments when required.’<sup>10</sup>

The SSCSB and the PJCHR feature particularly prominently in the *Legislation Handbook*, and the scrutiny criteria applied by the SSCSB, and to a lesser extent the PJCHR, are often pointed to as a useful checklist for public servants when developing proposed legislation.<sup>11</sup> For example, during the 2012 inquiry into the future direction of the SSCSB, the then Clerk of the Senate observed:

[T]he committee’s most effective work has been in influencing approaches to, and standards in, the drafting of legislation and the provision of supporting documentation (such as, explanatory memoranda). Although some of the committee’s work in this area might be characterised as formulaic, there is a risk that, if the committee stepped away from this work, it would not take long for drafting standards to reflect the absence of a watch dog.<sup>12</sup>

The strong influence of the SSCSB on the development and drafting of legislation is also evident from the Drafting Directions published on the Office of Parliamentary Counsel’s (OPC’s) website. These Drafting Directions are used regularly by the OPC to assist departmental staff to prepare clear drafting instructions for proposed laws. A handful of these directions are particularly relevant for those providing instructions with respect to counter-terrorism laws, and each of these Drafting Directions explicitly refer to the work of the SSCSB and occasionally the PJCHR, and/or discuss key components of the scrutiny criteria applied by

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possible’ among other matters. The handbook also summarises some common issues of concern arising from the PJCHR’s consideration of SOC’s.

<sup>10</sup> Ibid 65, 72, 77. For example, the *Legislation Handbook* explains that parliamentary committees ‘may hold public or private hearings to take evidence and seek information from ministers and their departments’ and that ‘departments will need to be available to provide background briefing and factual information to the minister or the committee’. It also provides that, ‘if a bill has been referred to a committee, it will not be programmed for Senate debate until the committee has reported’. The handbook also describes what is likely to be the Minister’s response to a parliamentary committee’s concerns or requests for information. For example, it explains that a Minister may respond to the PJCHR by ‘(a) proposing government amendments to legislation; or (b) writing to the Committee explaining why the bill is in the form it is’. It also describes the SSCSB Alert Digest process and the need for departments to be available to assist the Minister in responding to SSCSB requests for information.

<sup>11</sup> SSCSB, Parliament of Australia, *Inquiry into the future direction and role of the Scrutiny of Bills Committee* (2012) [2.30].

<sup>12</sup> Ibid [2.31].

these committees.<sup>13</sup> In many cases, these directions are intended to operate as a prompt for the instructing departmental officer either to obtain specific legal advice about the particular provision that engages the scrutiny criteria, or to consider alternative policy options that would avoid engaging the criteria in such a way. For example:

- Drafting Direction 3.1 includes a requirement to consider whether the proposed Bill may infringe upon or engage the implied freedom of political communication.<sup>14</sup> This encourages careful consideration of both constitutional compliance, but also rights principles including freedom of speech.
- Drafting Direction 3.5 encourages instructors to have regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide to Commonwealth Offences) when proposing legislation that includes criminal offences.<sup>15</sup> This encourages consideration of the range of rights issues previously considered by the SSCSB, such as burden and onus of proof, extended liability offences, coercive powers, and clear drafting of the elements of a criminal offence.<sup>16</sup>
- Direction 4.2 sets out the circumstances in which the OPC will refer a draft Bill to a department other than the instructing department for advice or comment. These include the requirement that a draft Bill be referred to the Office for International Law (OIL) if it proposes to, or may, engage or infringe Australia's international obligations,

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<sup>13</sup> Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.1* (January 2017); Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.5* (31 February 2013); Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.9* (June 2013); Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 4.2* (August 2016); Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 4.5* (2 February 2015).

<sup>14</sup> Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.1* (January 2017) 6–7.

<sup>15</sup> Attorney-General's Department, Commonwealth Government, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2001) <<https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>>.. While the direction notes that the Guide to Commonwealth Offences is not binding, it encourages the proponent department to refer the relevant provisions to the AGD Criminal Justice Division if the Bill contains novel or complex issues or departs significantly from 'fundamental criminal law principles'. Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.5* (31 February 2013).

<sup>16</sup> Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.5* (31 February 2013) 5.

including the human rights obligations contained in the treaties that comprise the PJCHR mandate.<sup>17</sup>

The above examples, which are emulated in other public servant guidance materials, suggest that the technical scrutiny committees have an important behind-the-scenes impact on the key actors in the development of legislation.<sup>18</sup> The Drafting Directions also demonstrate the ‘gatekeeper’ role played by the OPC when it comes to ensuring that instructing departments seek specialist advice if they intend to pursue policy options that infringe upon the scrutiny criteria applied by these committees. As discussed below, this gatekeeper role is further confirmed by interviews conducted with OPC staff and public servants.

### *C Interview Material*

Interviews conducted with those involved in the development of the case study Acts confirm that parliamentary committees can have a rights-enhancing impact on the content of proposed laws and contribute to the ‘culture of rights compliance’ within the federal public service. However, the interviews also help elucidate the limits of parliamentary committees as a form of pre-introduction rights protection. In particular, the interviews highlight that, at key stages of the policy development process, the rights-enhancing impact of committees may hinge on the value attributed to parliamentary scrutiny by the proponent Minister or his or her Cabinet colleagues.

This section of Chapter 7 summarises what the interviews reveal about the *pre-introduction* impact of parliamentary committees.. These interviews also help illustrate the tension between the deliberative and authoritative roles of parliamentary committees discussed above. The interviews suggest, for example, that the inquiry-based, deliberative committees with strong legislative and public impact, such as the PJCIS, are at the forefront of the minds of those involved in the development of the case study Bills. The interviews also confirm that the technical scrutiny committees, and in particular the SSCSB, command authority and respect among those tasked with drafting proposed new laws. As discussed further in Chapter 8, this

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<sup>17</sup> Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 4.2* (August 2016).

<sup>18</sup> See, eg, Attorney-General’s Department, Commonwealth Government, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2001).

again highlights the benefit of considering the different strengths and weaknesses of particular committees in the system when developing reform options to improve rights protection at the federal level. This is discussed in further detail below and in Part III.

### 1 *The ‘Technical Scrutiny’ Committees*

Interviews with senior officers from the OPC confirm the influential role of the SSCSB when it comes to drafting proposed laws and liaising with instructing departments.<sup>19</sup> In addition, the fact that many of the SSCSB’s common concerns are articulated in the Guide to Commonwealth Offences makes reference to the work of the SSCSB a particularly efficient way for OPC staff to alert instructing departments to potential concerns about proposed counter-terrorism legislation.<sup>20</sup> The OPC officers also explained that the SSCSB criteria reflect ‘best practice’ standards when it comes to the development of policy and legislation,<sup>21</sup> and provide a strong indication of how key terms within a proposed Bill may be later interpreted by the courts:

Well I think at the end of the day, a lot of the principles that are looked at by Senate Scrutiny of Bills Committee are around the principles of legality, ... and so that sort of infiltrates all aspects of public life when you are talking about legislating for what citizens can and can’t do. ...

And those things are at the forefront of our minds when we are drafting for example. So if you want to interfere with fundamental rights, you need to be express and clear about that, and if

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<sup>19</sup> For example, First Parliamentary Counsel Mr Quiggin explained that the OPC has a database of SSCSB reports that assist parliamentary counsel to keep on top of relevant issues with respect to Bills that they may be drafting. Interview with Peter Quiggin, First Parliamentary Counsel, Office of Parliamentary Counsel (Adelaide, 3 August 2016).

<sup>20</sup> Interview with Meredith Leigh and Naomi Carde, Office of Parliamentary Counsel (Canberra, 24 May 2016). The officers said: ‘A lot of the concerns that the Scrutiny of Bills Committee might coincide with what might be in Commonwealth legal policy in relation to a particular matter, for example in the Guide to Framing Criminal Offences’. Department officers responsible for developing new criminal offences also indicated that the integration of the SSCSB’s criteria into the Guide to Commonwealth Offences is significant. For example, an AGD official said: ‘[T]hose principles do shape the way you think about constructing offences, ... I would say as a public servant that some of those principles speak to me in terms of what is fair and reasonable as well as being things that formally a committee will be looking for. It will certainly influence the way I would write Explanatory Memoranda, absolutely.’ Interview with Official A, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>21</sup> The OPC officers explained the type of assistance they are able to provide to instructors when it comes to anticipating formal parliamentary scrutiny, emphasising the need to draw a clear line between providing examples of best practice (which is appropriate) and providing policy advice (which is not parliamentary counsel’s role): Interview with Meredith Leigh and Naomi Carde, Office of Parliamentary Counsel (Canberra, 24 May 2016).



you are not, you run the risk of the court reading down what you are trying to do. And we do have those discussions with instructors.<sup>22</sup>

The OPC officers also confirmed that the technical scrutiny committees, rather than the inquiry-based committees, have the strongest influence on their work.<sup>23</sup> This confirms the findings in Chapter 4 relating to the particular strengths the SSCSB holds among this category of key participants arising from its deliberate refusal to engage in policy matters when scrutinising a Bill. Like the SSCSB, the OPC also refuses to provide advice on policy matters, and sees its role as providing ‘technical’ advice.<sup>24</sup>

According to the interview material, the SSCSB’s ‘clear’ and ‘consistently applied’ scrutiny criteria also gives it a distinct advantage over the newer and broader-mandated PJCHR when it comes to ease of integration into drafting and policy development practice.<sup>25</sup> For example, an AGD official explained:

The principles [applied by the SSCSB] are very specific ... it’s very clear what choice is the better one to make. And then if you feel in the circumstances there are a series of reasons why you need to make the choice that could contravene or raise concerns with a principle, you should have a set of reasons and be able to clearly articulate what they are and how you’ve weighed it up.<sup>26</sup>

In a similar vein, former PJCHR Legal Advisor Professor Simon Rice observed:

One of the advantages that the [SSCSB and the SSCRO] have is they’re scrutinising against a limited, well defined and well understood range of criteria, that by and large conservative politicians will accept as indicators of good government. So there is nothing political really in what they are doing. ...

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<sup>22</sup> Interview with Meredith Leigh and Naomi Carde, Office of Parliamentary Counsel (Canberra, 24 May 2016).

<sup>23</sup> Ibid. The officers said: ‘I think the two committees, the Scrutiny of Bills and the SSCRO, we really focus on. PJCHR we focus on at a broad level, and the remaining committees are relevant when they directly comment on the Bill.’

<sup>24</sup> Ibid.

<sup>25</sup> Interview with Maureen Weeks, Deputy Clerk of the Senate (Canberra, 23 May 2016); Interview with A (Canberra, 23 May 2016).

<sup>26</sup> Interview with Official A, Attorney-General’s Department (Canberra, 23 May 2016).

So when the [SSCSB] says there's a problem here with the right of review, that's probably the nearest they get to a policy contest. ... [B]y and large, what they are doing is helping the government shape their legislation in a good governance kind of way.<sup>27</sup>

For public servants who are directly engaged in policy and legislation development, the well-entrenched nature of the SSCSB's scrutiny criteria contrasts with the more nebulous mandate of the PJCHR, which has proved challenging for some public servants to integrate into their policy practice. For example, the interview material highlights the distinct lack of familiarity with international human rights law concepts among public servants responsible for developing legislation prior to the introduction of the PJCHR, particularly among those outside of the AGD.<sup>28</sup> Even after the introduction of the PJCHR and the requirement to prepare SoCs for every Bill, many public servants have yet to familiarise themselves with these concepts.<sup>29</sup> This has resulted in a significant divergence in the levels of engagement with human rights issues across the public service and in the quality of SOC's prepared.<sup>30</sup> This was also reflected in the interview material; for example, one interviewee said:

[E]ven fairly recently, anecdotally you hear that departments are getting correspondence from the Human Rights Committee and they just don't understand what it is. They certainly know what they're getting when they get a scrutiny of Bills letter, but even as recently as in the last

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<sup>27</sup> Interview with Simon Rice, former Legal Advisor to the Parliamentary Joint Committee on Human Rights (Sydney, 24 May 2016).

<sup>28</sup> See, eg, Interview with Simon Rice, former Legal Advisor to the Parliamentary Joint Committee on Human Rights (Sydney, 24 May 2016); Interview with Simon Henderson, Law Council of Australia (Canberra, 23 May 2016); Interview with Nicola McGarrity, Gilbert & Tobin Centre for Public Law (Sydney, 31 May 2016); Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016).

<sup>29</sup> For an overview of the impact of the reforms on the public service see Greg Manning, 'The Human Rights (Parliamentary Scrutiny) Act' (speech delivered at APS Human Rights Network, Canberra, 2 December 2015). At the time of the introduction of the requirement to prepare SoCs, funding was provided across the public service to support public servants from across departments to fulfil this requirement. The AGD delivered training on SoCs to over 600 policy and legislation officers across the public service. However in the 2014 Federal Budget funding for the Commonwealth Human Rights Education Program was cut by the Abbott Government, and many of the initiatives outlined in the Australian Human Rights Framework were no longer actively pursued. As a result, not all public servants have had access to specific human rights training. For further information see Australian Government, *Budget measures: Budget Paper No 2: 2010–11: Attorney-General's Portfolio* (2010) 94; Attorney-General's Department, *Annual Report 2012* (2013) ch 4 About the Department; Australian Government, *Budget measures: Portfolio Additional Estimates Statements 2014–15: Attorney-General's Portfolio* (2014) 29; Australian Lawyers Alliance, 'Budget Overview: Cuts to Justice and Human Rights' (Media Release, 15 May 2014) <<https://www.lawyersalliance.com.au/opinion/budget-overview-cuts-to-justice-and-human-rights>>.

<sup>30</sup> PJCHR, Parliament of Australia, *Annual Report 2012–13* (2013) 10–12.

couple of years, [there have been] stories about departments still struggling to work out what is this all about.<sup>31</sup>

This point was also expressed by former PJCHR Legal Advisor Professor Simon Rice, who pointed to the important leadership role played by the proponent Minister when it comes to ensuring human rights compliance is taken seriously at the pre-introduction phase. Professor Rice said:

If the Minister says to the department ‘give me a human rights compatible piece of legislation’ they will. If a Minister doesn’t care or bother, then you need a department to come up with it. And sometimes the Minister won’t care and sometimes they’ll say ‘what’s this crap?’ So I actually think the message coming down [is very important]. It’s the Minister who has to table [the statement]. It’s the Minister who has to give the speech. It’s the Minister who gets the correspondence from the committee. If they don’t care, why should the departments bother?<sup>32</sup>

Despite these significant challenges, and broad variations in knowledge and experience across departments, those working directly to improve the quality of SoCs share some optimism about the potential for this mechanism to have a meaningful impact on the development of counter-terrorism laws. For example, some policy officers who were responsible for preparing SoCs for the case study Acts suggest that, at least within their divisions, a range of formal and informal processes are in place to help ensure that high-quality SoCs are produced. This includes: formal and ‘on the job’ training on the preparation of SoCs;<sup>33</sup> the practice of obtaining advice early from OIL on the content of department-drafted SoCs;<sup>34</sup> genuine engagement with the PJCHR on the quality of SoCs; and an informal ‘lessons learnt’ process.<sup>35</sup> This appears to be translating into a greater human rights awareness at least among some senior AGD officers, and those responsible for developing counter-terrorism laws. As AGD National Security Branch officer Mr Gifford said:

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<sup>31</sup> Interview with B (Canberra, 23 May 2016).

<sup>32</sup> Interview with Simon Rice, former Legal Advisor to the Parliamentary Joint Committee on Human Rights (Sydney, 24 May 2016).

<sup>33</sup> Interview with Cameron Gifford, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>34</sup> Eg, Interview with Official B, Attorney-General’s Department (Canberra, 30 May 2016).

<sup>35</sup> Interview with Cameron Gifford, Attorney-General’s Department (Canberra, 23 May 2016).

My earlier [policy roles] would probably have had less of a sharper focus on human rights and international obligations and that's probably to some extent the result of the creation of the human rights compatibility statements, but also, you can now see that the committees themselves are having those considerations in a sharper focus than they used to have as well.<sup>36</sup>

In its 2013–14 annual report, the PJCHR also reported that '[t]he quality of statements of compatibility continued to improve'<sup>37</sup> and that, in many cases, SoCs 'provided sufficient information on proposed measures limiting human rights for the committee to conclude its examination without requesting further information from the legislation proponent'.<sup>38</sup> However, the PJCHR also observed that:

[A] significant number of bills and legislative instruments during the reporting period failed to provide sufficient information or supporting evidence to justify potential limitations of human rights. ... In particular, the committee noted that proponents of legislation often claimed that measures engaging human rights were 'reasonable, necessary and proportionate' without providing any supporting analysis or empirical evidence. ...

In a number of cases, the committee noted that additional information provided by the legislation proponent addressed the committee's concerns, but should have been included in the statement of compatibility for the bill or instrument in the first instance.<sup>39</sup>

The material above suggests that the requirement to issue SoCs is beginning to have a rights-enhancing impact on the development of legislation, although there remain significant concerns about the veracity of this process when policy is 'Minister driven' and SoCs are 'retro-fitted' to already finalised legislation. The interviews also suggest that, taking into account the low base of human-rights literacy among the public service prior to the introduction of the PJCHR, there now appear to be some foundations (at least within the AGD) upon which to improve the capacity of the public service to engage with rights in a meaningful way.

The implications of these findings for improving the rights-protecting capacity of the parliamentary committee system are discussed further in Part III, where recommendations are

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<sup>36</sup> Ibid.

<sup>37</sup> PJCHR, Parliament of Australia, *Annual Report 2013–14* (3 May 2016) [3.30].

<sup>38</sup> Ibid [3.31].

<sup>39</sup> Ibid [3.32]–[3.34].

made to build upon the particular strengths of the SSCSB when it comes to influencing the pre-introduction development of legislation. Changes are also proposed to the processes of the PJCHR to capitalise on its modest but improving capacity to guide legislative drafters and policy makers.

## 2 *The 'Inquiry-Based' Committees*

The interviews I conducted for this research, combined with the material discussed in Chapter 6, suggest that the inquiry-based committees, such as the PJCIS and LCA Committees, can also have a pre-introduction impact on the development of proposed counter-terrorism laws. This most commonly takes two forms: as an impetus for the legislative proposal itself or as part of the risk assessment process that policy officers undertake in anticipation of future parliamentary scrutiny. Those responsible for developing proposed counter-terrorism laws confirmed that, while often the impetus for these laws is operational or Minister driven,<sup>40</sup> past parliamentary committee recommendations regularly feature as a source of particular provisions.<sup>41</sup> For example, AGD National Security Branch officer Mr Gifford said:

[F]or instance, if we're taking something forward like we did with the Foreign Fighters Act, that was very much a theme about how to address that particular challenge and we did draw together a range of recommendations that had been around for quite some time to address that issue. So it's not necessarily that you're always developing new laws in relation to a policy gap, but sometimes there's something that's already sitting in the background where you go, actually this is the right response, for this particular challenge, at this particular time.<sup>42</sup>

The AGD officers interviewed also emphasised the important role policy staff play in ensuring the legislative response to an identified operational need is balanced, and has regard to any relevant previous parliamentary reviews or inquiries. For example, some officers interviewed

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<sup>40</sup> Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016). See also, Interview with Official B, Attorney-General's Department (Canberra, 30 May 2016).

<sup>41</sup> For example, an AGD official said: 'Sometimes it might be something more in the nature of a review whether that's a department-initiated review or a government-initiated review or a statutory review, so there's quite a number of reviews that have been pre-programmed into legislation, so when powers have been enacted, it's been said that they'd be reviewed at a later time.' Interview with Official B, Attorney-General's Department (Canberra, 30 May 2016).

<sup>42</sup> Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016).

explained that often the policy officer works as a ‘translator’<sup>43</sup> between the operational staff (such as police or intelligence officers) and the Parliament. In this role, the policy officer is regularly engaged in seeking detailed information from operational staff about *why* they need a particular power or new offence provision. The policy officer may also be involved in developing safeguards that limit the use of the new power or scope of the new offence, in order to develop a legislative proposal that is more likely to withstand public and parliamentary scrutiny.<sup>44</sup> For example, an AGD official explained that past parliamentary inquiries and recommendations influence:

the conversations that we in this department might have with agencies about well, what’s the operational justification, how far do we need to go, we need to have some accountability here. [We often say] ‘Yes we know that in practice you are above board and behave appropriately but the public and senate committees will be looking for more than just your word that you do things properly, some mechanisms for assuring the, for assurance about that’. So it definitely shapes the conversations in developing those provisions.<sup>45</sup>

Those working on policy development of counter-terrorism laws also said that the anticipation of future inquiry-based parliamentary scrutiny can sharpen their focus on developing a strong evidence base for the policy goals of the law and help identify the safeguards or oversight mechanisms that might be needed to guard against unfair or unjustified intrusion on the rights of particular groups in the community. For example, Tony Alderman, Manager of Government and Communications, AFP, said:

In the AFP’s view, parliamentary committees and their processes are very useful and very valuable. They provide an opportunity for the AFP to outline a case for necessity, provide an operational context, clarifying the extensive existing oversight mechanisms applying to the

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<sup>43</sup> Mr Alderman said: ‘The [AFP] Policy Unit operates as a translator for operational need into policy or legislative outcomes. The Policy Unit works as a team with the operational staff of the AFP to develop and deliver policy and legislative outcomes.’ Interview with Tony Alderman, Australian Federal Police (telephone, 6 June 2016).

<sup>44</sup> For example, AGD Official A noted: ‘[I]n many cases, ... I think that [it is] knowledge of scrutiny to come, which influences the behaviour of government and public servants at an earlier stage in the process.’ Interview with Official A, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>45</sup> Ibid.

AFP, and demonstrate the range of transparency and accountability measures and point to any safeguards.<sup>46</sup>

For these policy officers, their approach was less about avoiding questions from a committee inquiry, and more about the need to ensure that, when developing legislation in response to operational need, consideration is given to the types of issues parliamentary committees are likely to focus on in any future scrutiny of the proposed Bill. As Mr Gifford said:

It's not so much what's going to come through the PJCIS, we always try and put forward a piece of legislation which is the most balanced legislation as well as meeting the operational need, but also, only engaging rights to the extent that it is absolutely necessary.<sup>47</sup>

The interviews also suggest that there is a practice of reflection on past parliamentary committee inquiries when AGD officers are engaged in the early stages of development of a Bill that proposes changes to existing counter-terrorism laws. As an AGD official explained:

It would be remiss of us not to consider previous committee observations. And that's even where the composition of a committee has changed, because it is part of a process through which previous amendments have been considered. Even if that committee has changed, even if the government has changed, it's illustrative of the views and questions we might get. So even if it doesn't affect the policy direction, it certainly affects how we consider the issues and present that advice to government and then how we might engage with our stakeholders.<sup>48</sup>

Similarly, Mr Alderman explained that the AFP policy team will 'regularly look to see what parliamentary committees have said in the past' and consider whether the AFP should explain the need for the reform to the public.<sup>49</sup> Mr Alderman explained that '[o]ften the AFP can provide a clear public statement of why the reform is needed, how it would benefit from the passage of the law, what the risks are in terms of not passing the law'.<sup>50</sup>

The interview material also suggests that AGD officers take seriously the process of appearing as a witness at a parliamentary inquiry into a Bill and this usually involves the policy

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<sup>46</sup> Interview with Tony Alderman, Australian Federal Police (telephone, 6 June 2016).

<sup>47</sup> Interview with Cameron Gifford, Attorney-General's Department (Canberra, 23 May 2016).

<sup>48</sup> Interview with Official B, Attorney-General's Department (Canberra, 30 May 2016).

<sup>49</sup> Interview with Tony Alderman, Australian Federal Police (telephone, 6 June 2016).

<sup>50</sup> Ibid.

development team as well as support from senior operational officers.<sup>51</sup> For counter-terrorism Bills, Mr Gifford said that the AGD tend to present a ‘portfolio appearance’ including AFP, and ASIO depending on the nature of the reforms.<sup>52</sup> Mr Gifford also said:

We appear then as a witness, and it can take a few hours, it can take a lot longer. More often than not these days we end up going back once or twice. Particularly with the PJCIS, they’re pretty keen for us to ... make sure that we’ve examined all the issues that are raised either by the submissions or in oral evidence, where we can come back and provide some additional information in relation to that. Sometimes that means actually coming back a second time to appear as a witness again.<sup>53</sup>

Once a committee has made recommendations for changes with respect to a Bill, the responsible department, as well as any government agencies affected, will be required to reflect on the implications of the proposed change and advise the proponent Minister. Drafting instructions will then be provided to the OPC if the Minister intends to implement changes recommended by parliamentary committees by way of amendment to the Bill. This process can be assisted by prior anticipation of scrutiny by OPC staff and their instructors, particularly in the context of ‘controversial Bills’ such as those relating to national security, where committee consideration of the detailed provisions of a Bill regularly result in rights-enhancing (rather than rights-limiting) change. As Mr Gifford explained:

There’s usually not huge surprises and that is mostly because we’ve hopefully done a very good job in terms of actually looking at the issues being raised before the committee, so we’re aware of the likely direction the committee potentially may go. It’s still very challenging in terms of the time frames that are attached to these things. So you know, the PJCIS inquiry into [the Foreign Fighters Bill], I think happened over the course of a month, which for such a large reform exercise that was quite challenging. It becomes very challenging in terms of the speed at which you need to think and respond to the issues as they are raised, but also the speed at which you’re able to implement them. So again, when you get to the government amendment

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<sup>51</sup> Interview with Official B, Attorney-General’s Department (Canberra, 30 May 2016).

<sup>52</sup> Interview with Cameron Gifford, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>53</sup> Ibid. Mr Gifford also noted that it is common for the department to provide further supplementary submissions to the inquiry-based committees. These submissions regularly respond in detail to the issues raised by other submission makers or witnesses.



stage, ... parliamentary counsel do the most tremendous job of being able to turn those [recommendations] into provisions very very quickly.<sup>54</sup>

This suggests that the inquiry-based committees provide an important behind-the-scenes opportunity for senior public servants to provide direct advice to proponent Ministers on the risks and benefits of adopting particular legislative provisions in light of past or present committee recommendations. This can provide an ‘extra’ opportunity for such officers to draw attention to those features of the original Bill that have unjustified impacts on rights, or that fail to ‘strike the right balance’ between operational need and rights protection.

#### *D Summary of Findings on Hidden Impact*

This chapter has presented evidence of the hidden impact parliamentary committees can have on the development of proposed laws. For example, the documentary evidence suggests that the work of the SSCSB, and to a lesser extent the PJCHR, features regularly in the materials relied upon by public servants responsible for developing and drafting counter-terrorism legislation. Some of these documents, in particular the *Legislation Handbook*, Drafting Directions and Guide to Commonwealth Offences, translate the abstract principles underpinning the SSCSB and PJCHR mandates into practical checklists to be applied during particular stages of the legislation development process. In this way, these documents may help create a ‘culture of rights compliance’ within the public service. Over time, they also give rise to the shared view that the scrutiny criteria applied by the SSCSB (and to a lesser extent the PJCHR) reflect ‘best practice’ when it comes to developing laws. The interview material also suggests that the requirement to introduce all Bills with SoCs has, at the very least, required policy officers to turn their minds to the human rights implications of the legislation they are developing, even if the quality of engagement with human rights concepts varies significantly across departments and ministerial portfolios. The interview material further suggests that the prospect of a public inquiry can sharpen policy officers’ focus on the right implications of proposed new provisions and encourage them to develop safeguards or other rights-protecting mechanisms when seeking to translate operational need into legislative form.

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<sup>54</sup> Interview with Cameron Gifford, Attorney-General’s Department (Canberra, 23 May 2016).

While these findings are compelling, it is important to note that, despite the significant hidden impact of the parliamentary committees studied, I do not argue that committee scrutiny provides a *sufficient* form of rights protection when it comes to counter-terrorism laws. As discussed earlier, I recognise that the content of the enacted case study Acts departs in significant ways from human rights standards.<sup>55</sup> The interview material also reveals that the rights-enhancing hidden impact of parliamentary committees remains vulnerable to a number of dynamic factors. These include:

- the degree of respect with which the proponent Minister holds the particular parliamentary committee (where this is very low, public servants are unlikely to prioritise the preparation of robust policy advice to anticipate or address the committee's concerns);
- the degree to which the policy officers are able to present alternative policy and legislative options to the Minister for consideration (where a Bill is led exclusively from the Minister's office, the scope for public servants to reflect upon or anticipate parliamentary scrutiny is likely to be very narrow); and
- the expertise and experience of the policy officers and parliamentary counsel involved in the development and drafting of the Bill (where awareness of the scrutiny criteria applied by the SSCSB and the PJCHR is very low, the capacity to reflect upon or anticipate parliamentary scrutiny is also low).

As discussed in Part III, these factors point to significant limitations when it comes to parliamentary committees and the generation of a sufficiently strong rights-scrutiny culture at the federal level. However, despite these important considerations, the material set out in Chapter 7 supports the general theme of my research: that the rights-enhancing nature of the parliamentary committee system is most strongly felt when committees work together to influence the development and content of a proposed law. In particular, the above material

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<sup>55</sup> For examples of articles documenting the rights-infringing content of Australia's counter-terrorism laws see George Williams, 'The Legal Assault on Australian Democracy: the Annual Blackburn Lecture' (2015) 18 *Ethos* 236; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136; Gabrielle Appleby, 'The 2014 Counter-terrorism Reforms in Review' (2015) 26(1) *Public Law Review* 4; Andrew Lynch and Nicola McGarrity, 'Counter-terrorism Laws: How Neutral Laws Create Fear and Anxiety in Australia's Muslim Communities' (2008) 33(4) *Alternative Law Journal* 225.

demonstrates that the complementary strengths of the committees within the system enhance the overall quality of the scrutiny a Bill receives, both before and after introduction. For example, this chapter shows that the technical scrutiny committees, such as the SSCSB, are well placed to have their clearly prescribed mandates integrated into practical guidance for public servants, but cannot expect to hold the same place in the minds of a public servant who is anticipating having to appear as a witness before a public inquiry. Similarly, while the inquiry-based committees are able to generate future policy options with clarity and specificity, they are less able to articulate a particular set of scrutiny criteria that they will apply consistently over time and that can be used in drafting or policy practice manuals.

For these reasons, the recommendations I propose in Part III are designed to encourage particular committees to build upon their individual strengths, and to improve opportunities for committees to work together when scrutinising rights-engaging legislation. They are designed to minimise the tensions between the deliberative and authoritative roles of parliamentary committees, for example by encouraging the technical scrutiny committees to develop practical, accessible guidance for public servants and by supporting technical-based committees to provide meaningful, deliberative forums for proposed new laws to be reviewed and discussed. In this way, the changes I propose are designed to place the full range of parliamentary committees in the minds of those responsible for developing, drafting and introducing proposed new laws, and to maximise the opportunities for rights-enhancing alternatives to legislative provisions to be developed and enacted. These changes are discussed further in the next part of this thesis.

# PART III: IMPROVING THE RIGHTS- PROTECTING CAPACITY OF THE PARLIAMENTARY COMMITTEE SYSTEM

In the first two parts of this thesis, I explored the place parliamentary committees hold in the Australian model of rights protection and evaluated the impact of four prominent committees on the development, debate and enactment of 12 case study Acts. In this final part of the thesis, I analyse the material presented in Part II to identify the particular strengths and weaknesses of each of the committees studied and explore options for minimising or resolving the tension between the deliberative and authoritative roles of parliamentary committees. This analysis supports the central argument in my thesis, namely that only by considering parliamentary committees *working together as a system* can realistic proposals for substantive improvement of Australia's parliamentary model of rights protection be developed. This part concludes by reflecting on the discussion in Chapter 1 regarding the conventional scepticism about the parliamentary model of rights protection, and offers new perspectives on how to improve this system of rights protection.

Part III comprises four short chapters that draw upon the material presented earlier in this thesis. Chapter 8 discusses the complementary strengths of individual committees within the system, and the benefits of building upon these strengths to enhance the quality of interactions with other committees in the system. Chapter 9 sets out reforms to the system of committees as a whole, designed to encourage the type of collaboration between committees that my research suggests will improve rights protection. Chapter 10 sets out complementary reforms to the individual committees studied to support the system-wide changes recommended in Chapter 9. Finally, Chapter 11 revisits the arguments outlined in Chapter 1 relating to Australia's parliamentary model of rights protection in light of the findings of my research.

In this part of the thesis, I explain how making changes to the processes or powers of individual committees can improve their capacity to have a rights-enhancing impact on proposed laws. However, I also argue that focusing exclusively on individual committees, without understanding how they work with other committees as part of a broader system, may overestimate the rights-protecting role of individual committees and miss important system-

wide opportunities for practical and sustainable reform. The evidence collected in Part II shows, for example, that parliamentary committees had the most significant rights-enhancing impact on the case study Acts when multiple committees worked together to scrutinise a law. This suggests that improving opportunities for collaboration between committees would improve the rights-enhancing capacity of the system as a whole. The evidence in Part II also shows that those committees that are able to maintain high levels of legitimacy in the eyes of a range of participants have a stronger rights-enhancing impact on the development of the law. This suggests that there is a need to ensure that any reforms to individual committees work to strengthen (rather than disrupt) their legitimacy across the committee system.

In this way, my recommendations depart in important respects from those made by other commentators who have focused on improving the rights-enhancing capacity, effectiveness or efficiency of particular committees.<sup>1</sup> For example, the recommendations in this thesis seek to strengthen the technical scrutiny committees' capacity to produce timely and high-quality reports that can be relied upon by submission makers to inquiry-based committees, rather than trying to turn these scrutiny committees into more active inquiry-based forums.<sup>2</sup> My recommendations also seek to expand the capacity for multiple inquiry-based committees to hold public hearings into the same Bill, rather than trying to 'streamline' the number of committee hearings being undertaken.<sup>3</sup> The recommendations I make also seek to emulate features of high-impact committees (such as the PJCIS) within the context of other committees

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<sup>1</sup> For examples of committee-specific studies see George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 257; George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469; Catherine Rodgers, 'A Comparative Analysis of Rights Scrutiny of Bills in New Zealand, Australia and the United Kingdom: Is New Zealand Lagging Behind its Peers?' (2012) 1 *Australasian Parliamentary Review* 4; Stephen Argument, 'Of Parliament, Pigs and Lipstick (Slight Return): A Defence of the Work of Legislative Scrutiny Committees in Human Rights Protection' (Paper presented at the Australian Institute for Administrative Law Forum, Canberra, 21–22 July 2011).

<sup>2</sup> For example, in their studies on the PJCHR, Williams and Burton and Williams and Reynolds have recommended a more robust public engagement role for the PJCHR. Williams and Reynolds, above n 1; George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34(1) *Statute Law Review* 58. A more active public inquiry role was also canvassed by some submission makers to the SSCSB, Parliament of Australia, *The future direction and role of the Scrutiny of Bills Committee* (2012) [4.22].

<sup>3</sup> As discussed in Chapter 9, some commentators and key participants in the committee system hold concerns regarding the increase in the number of committee inquiries being undertaken and have called for a 'streamlining' of references to committees. See, eg, Phillip Thompson, 'Department of the Senate Dealing with Too Many Inquiries', *The Canberra Times* (Canberra), 7 February 2016 <<http://www.canberratimes.com.au/national/public-service/departments-of-the-senate-dealing-with-too-many-inquiries-20160207-gmo4pj.html>>.

that may not yet be achieving these results.<sup>4</sup> My recommendations also recognise that the hidden impact of parliamentary committees is a particularly fertile ground for improving rights protection.<sup>5</sup> In addition, the changes recommended in this thesis focus almost exclusively on non-legislative changes that can be pursued by committee Chairs, parliamentary staff and public servants.<sup>6</sup> These changes are also less dependent on strong leadership from the executive than those previously recommended by other scholars,<sup>7</sup> although support at the Ministerial level is encouraged and anticipated.

For these reasons, some rights advocates could view my recommendations as unambitious. This is a view I shared prior to undertaking the research compiled in Part II. However, as discussed further below, the evidence of the important rights-enhancing impact of the parliamentary committee system on the case study Acts has demonstrated the value in building upon (rather than seeking to replace) the practices, functions and powers of the existing parliamentary committee system. As Chapter 11 explains, this demands a more subtle, pragmatic approach than that often recommended by rights advocates who are sceptical of the parliamentary model of rights protection.

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<sup>4</sup> As noted in Chapter 4, some submission makers interviewed expressed concern about the secondee arrangements employed by the PJCIS. See, eg, Interview with Kris Klugman and Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016).

<sup>5</sup> Meg Russell and Meghan Benton, 'Assessing the Policy Impact of Parliament: Methodological Challenges and Possible Future Approaches' (Paper presented at the PSA Legislative Studies Specialist Group Conference, London, United Kingdom, 24 June 2009) 20.

<sup>6</sup> This is in line with Uhr's approach to improving the effectiveness of parliamentary committees: see, eg, John Uhr, *Keeping Government Honest: Preconditions of Parliamentary Effectiveness*, Parl Paper No 29 (1995) 53.

<sup>7</sup> See, eg, Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046; Janet Hiebert, 'Legislative Rights Review: Addressing the Gap Between Ideals and Constraints' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 39.

## CHAPTER 8: BUILDING UPON THE COMPLEMENTARY STRENGTHS OF INDIVIDUAL COMMITTEES IN THE SYSTEM

Parts I and II of this thesis set out the defining characteristics of the four parliamentary committees studied, and provided insights into how key participants in the law-making process view each of the four committees. This in turn uncovered the particular strengths and weaknesses of the individual committees studied and the different rights-enhancing impact the committees had on the case study Acts. For example, the material in Part II suggests that the LCA Committees provide a meaningful deliberative forum by holding popular and diverse public hearings but are not always able to translate their recommendations into legislative change. In contrast, the SSCSB has a strong behind-the-scenes impact as a result of its scrutiny principles being integrated into public service practice, but is rarely directly cited in parliamentary or public debates. As discussed below, understanding the implications of these strengths and weaknesses of the system of committees is central to identifying opportunities to improve rights protection at the federal level.

As discussed in Chapter 3, the LCA Committees and the PJCIS are ‘inquiry-based’ committees due to their common practice of calling for submissions and holding public hearings. The PJCHR and the SSCSB can be described as ‘technical scrutiny’ committees, as both are required to scrutinise all Bills against a set of prescribed criteria, and both rarely hold public hearings as part of this Bills scrutiny function.<sup>8</sup> It is hardly surprising that there is a considerable difference between the type of impact an inquiry-based committee has compared with that of a technical scrutiny committee. As outlined in Chapter 3, these categories of committees have distinct goals, functions, processes and powers, some of which are prescribed by legislation or in the Standing Orders. They are not designed to emulate each other. They contribute different things to the parliamentary committee system. What is interesting for this thesis is that, despite their organic evolution, each category of committee complements the strengths of the other when it comes to scrutinising the case-study Acts. Indeed, the evidence presented in Part II suggests that the highest overall impact on a Bill occurs when these different categories of

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<sup>8</sup> As noted in Chapter 3, this categorisation of the PJCHR as a ‘technical scrutiny’ committee has been contested by some commentators. See, eg, Williams and Reynolds, above n 1. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 2010, 271–2 (Robert McClelland).

committees interact in ways that complement each other's strengths. The following analysis aims to explain why this is the case.

### *A Inquiry-Based Committees Can Provide a Meaningful Deliberative Forum*

As noted above, the practice of calling for submissions and holding public inquiries allows the PJCIS and the LCA Committees to provide a deliberative forum for scrutinising the content of a Bill or policy proposal. Requiring senior public servants or senior police or intelligence officers to appear before a potentially hostile group of parliamentarians can also be a potent way for the inquiry-based committees to hold the government to account. Unlike the relatively passive experience of exchanging formal correspondence with the scrutiny committees, when participating in a public inquiry into a Bill, public servants have to personally attend a committee meeting and justify on the public record the particular policy and legislative choice they have made.

The public inquiry function of the PJCIS and LCA Committees also strengthens these committees' capacity to build legitimacy among a wider range of key participants. In particular, establishing relationships with sophisticated submission makers (described in Chapter 4 as the 'usual suspects') can help attract and retain diverse committee membership and legitimacy within the Parliament and the community. Sophisticated submission makers also attract media attention, which can in turn have an impact on the nature of parliamentary debate on the Bill.<sup>9</sup> In addition, as explained in Chapters 3 and 5, the recommendations made by the inquiry-based committee are specific and directive, often proposing precise amendments to key provisions of the Bill or its Explanatory Memorandum.

The specificity of the recommendations made by the inquiry-based committees, coupled with the legitimacy and public impact they are able to generate, contribute to their comparatively strong legislative impact.<sup>10</sup> This gives these committees important strengths that should be preserved and enhanced when evaluating options to improve the overall rights-enhancing capacity of the parliamentary committee system. For these reasons, the recommendations made

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<sup>9</sup> See the discussion in Chapter 6, Section D that documents references to committee work in the media. See also Appendix C.

<sup>10</sup> The particularly strong legislative impact of the PJCIS is discussed further below.



in Chapter 10 include a focus on increasing the deliberative capacity of the PJCIS and LCA Committees, as well as increasing the quality of the collaboration between committees in the system.

### *B Technical Scrutiny Committees Provide Vital Resources for Those Engaged in the Public Inquiry Process*

My research suggests that the capacity of the inquiry-based committees to influence strongly the shape of the case study Acts also depended, at least in part, on the work of the technical scrutiny committees. The technical scrutiny committees enhance the legislative and public impact of the inquiry-based committees in three key ways. First, they provide submission makers with reliable information about the purpose and policy objectives of the Bill, and the key features of the Bill that are likely to raise rights concerns. In the case of the SSCSB, this is likely to be in the form of an Alert Digest (more recently described as an ‘Initial Scrutiny Report’).<sup>11</sup> The use of Alert Digests means that the SSCSB is able to release information that summarises its preliminary concerns with the Bill quickly and in an accessible form, often prior to the close of submissions to the inquiry-based committees and usually before the commencement of second reading debate on the Bill. This means that, even when the SSCSB’s final report on the Bill is delayed because of difficulties associated with obtaining a response from the proponent Minister, submission makers and parliamentarians are at least armed with the SSCSB’s preliminary views *before* they are required to articulate their public position on the merits of the Bill.<sup>12</sup>

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<sup>11</sup> As noted in Chapter 3, in 2017, the SSCSB began publishing its scrutiny comments on recently introduced Bills (including responses received on matters previously considered by the committee) in one report, the *Scrutiny Digest*. However, the *Scrutiny Digest* continues to be divided into initial reports on the Bill (previously called ‘Alert Digests’, now called ‘Initial Scrutiny’) and concluded reports on the Bill (previously called ‘Reports’ now called ‘Commentary on Ministerial Responses’). See, eg, SSCSB, Parliament of Australia, *Scrutiny Digest No 7 of 2017* (21 June 2017).

<sup>12</sup> This is supported by the interview material. For example, an interviewee said that it is critical to ensure that at least the Alert Digest, and ideally the committee’s final report, is tabled *prior to* the resumption of second reading debates on the Bill: ‘the committee certainly sees that its work, the effectiveness of its work is massively reduced if it’s not available for debate, to inform ... that process. Having said that, if legislation has gone through, the committee still expects a response because it wants its complete view on the record.’ Interview with A (Canberra, 23 May 2016).

The reports of the PJCHR can also assist submission makers to inquiry-based committees, but of course this is dependent on submission makers having access to these reports prior to the deadline for receipt of submissions. As the material in Chapter 6 indicates, the tabling of PJCHR reports can sometimes be significantly delayed, and in this circumstance, submission makers and parliamentarians are without the benefit of the PJCHR's views at the point at which they are required to make public decisions on the merits of the Bill.<sup>13</sup> For this reason, as discussed in Chapter 10, I recommend strategies to increase the PJCHR's capacity to publish its views on the rights compatibility of a Bill at an earlier stage in the legislative process.

A second related way the technical scrutiny committees enhance the impact of the inquiry-based committees is by providing a consistent analytical framework to evaluate competing public interests or individual rights. In other words, the technical scrutiny committees can help the inquiry-based committees (and their submission makers) to unpack the idea of 'striking the right balance' between protecting national security and preserving individual rights.<sup>14</sup> As discussed in Chapter 5, the work of the technical scrutiny committees is also evident – albeit in a less direct way – in the recommendations made by the inquiry-based committees, which regularly align with some of the key concerns or issues raised by the technical scrutiny committees.<sup>15</sup>

The third, and perhaps most significant, way the technical scrutiny committees enhance the impact of the inquiry-based committees relates to their strong influence on the pre-introduction

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<sup>13</sup> For example, former Chair of the LCA Legislation Committee former ALP Senator Patricia Crossin said that while the LCA Committee would endeavour to look at the reports of the PJCHR as part of its work: 'timing was often a problem, particularly when the government was pushing for committee reports to happen quickly. Because that committee [PJCHR] only met when Parliament was sitting it sometimes didn't have the chance to consider the Bill and issue its report when we needed to use it.' Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>14</sup> See, eg, 31; Shipra Chordia, Sangeetha Pillai and George Williams, Submission No 17 to submissions to the PJCIS, Parliament of Australia, *Inquiry into the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015), 2–3; NSW Society of Labor Lawyers, Submission No 25 to submissions to the PJCIS, Parliament of Australia, *Inquiry into the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015), 5; Australian Bar Association, Submission No 43, to submissions to the PJCIS, Parliament of Australia, *Inquiry into the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) 2.

<sup>15</sup> See, eg, LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 8–9. See also PJCIS, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) ch 8, where the findings of the PJCHR were referred to on six occasions, including extensive quotations from the PJCHR's report.

stage of legislative development. This is outlined in Chapter 7, where the SSCSB was seen to have a particularly strong behind-the-scenes impact. For example, the interview material suggests that the consideration of the SSCSB's scrutiny criteria at the legislative proposal or Bill drafting stage effectively works to triage some of the rights concerning aspects of the Bill well before it enters the formal parliamentary committee system.

Care must be taken not to overstate the contribution the technical scrutiny committees make to the inquiry-based committees. Other factors, including committee membership and relationships with government agencies, play a significant role. However, the evidence in Part II suggests that the inquiry-based committees and their submission makers regularly rely upon the work of the technical scrutiny committees to inform the content and structure of their submissions and reports. It also suggests that the work of the inquiry-based committees would be substantially more complex without the behind-the-scenes impact of the SSCSB, and to a lesser extent the PJCHR. The converse is also true. The technical scrutiny committees would clearly struggle to have a substantive impact on the shape of proposed laws without the inquiry-based committees, and the media interest and parliamentary attention that comes from holding a public inquiry into a Bill. This suggests that both categories of committees are needed in the parliamentary committee system, and the different strengths of these committees should be preserved and enhanced if the rights-enhancing capacity of the system is to be improved. This finding, derived from the symbiotic relationship that exists between individual committees, pulls against the changes recommended by other scholars who have focused their attention on individual committees.<sup>16</sup> It also informs the recommendations set out below and discussed further in Chapters 9 and 10.

### C *Summary of Key Findings in Chapter 8*

In summary, this chapter draws together the findings made in Part II and the contextual information provided in Part I to identify the particular strengths and weaknesses of the four

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<sup>16</sup> For example, Williams and Burton advocate changes to the PJCHR that would see the committee more actively engage with submission makers as part of its Bills scrutiny work, including by calling for submissions and holding public inquiries. Similarly, some submission makers to the Future Directions of the SSCSB inquiry called for the SSCSB to take a more active inquiry role as part of its Bills scrutiny process. See, eg, Williams and Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection', above n 1; Williams and Reynolds, above n 1. See also SSCSB, Parliament of Australia, *Inquiry into the future direction and role of the Scrutiny of Bills Committee* (2012).

individual committees studied. In so doing, this chapter illustrates the tension between the authoritative and deliberative roles of parliamentary committees, and points to ways to minimise or resolve this tension when committees work together to contribute collaboratively to the scrutiny of proposed laws. In this way, this chapter sets the scene for the recommendations that follow in Chapter 10 that aim to capitalise on the particular strengths of individual committees, for example by enhancing the quality of the deliberative forum offered by the LCA Committees and improving the accessibility of the technical scrutiny provided by the SSCSB. This chapter also lays the foundation for the recommendations in the next chapter, which are designed to maximise the opportunities for different committees to work collaboratively and efficiently when reviewing or inquiring into rights-engaging laws.

## CHAPTER 9: REFORM OPTIONS FOR THE SYSTEM OF COMMITTEES

The analysis above highlights the particular strengths and weaknesses of each of the four committees studied and shows that when individual committees work together they can have a significant rights-enhancing impact on the development and content of Australia's counter-terrorism laws.<sup>1</sup> This suggests that the rights-enhancing capacity of the committee system could be improved by increasing meaningful collaboration between committees, while preserving and enhancing the particular strengths of the individual committees in the system. With this in mind, the next two chapters set out a range of integrated recommendations, starting with system-wide changes designed to promote more timely and higher quality collaboration between different committees in the system. This is followed by committee-specific recommendations in Chapter 10, which are designed to promote the strengths of each of the committees studied, whilst also increasing their capacity to engage efficiently with other committees in the system.

Conscious of the need to make my recommendations accessible to key participants in the committee system, my recommendations focus on practical changes and are presented in table format. The system-wide recommendations are set out in Table 9.1 and are organised around the need to encourage multi-committee scrutiny of rights-engaging Bills,<sup>2</sup> increase committee resources, ensure timely tabling of reports,<sup>3</sup> improve communication between committees and key participants,<sup>4</sup> and improve our understanding of parliamentary committees' contribution to the emerging rights-scrutiny culture within the Australian Parliament.<sup>5</sup>

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<sup>1</sup> A summary of the rights-enhancing impacts identified in Part II is set out in Appendix D.

<sup>2</sup> See Chapter 5, Section D.

<sup>3</sup> The resource challenges facing committees, and the consequences of failing to table reports prior to the close of the second reading debate on a Bill are discussed in Chapter 6, Section B.

<sup>4</sup> The benefits of improved communication between key participants are outlined in Chapter 4 and underscored by the evidence of 'hidden impact', set out in Chapter 7.

<sup>5</sup> This 'common rights-scrutiny culture' is identified in Chapter 6, Section C, and discussed further in Chapter 8 and below.

**Table 9.1 Reform Options for the System of Committees**

| Aim  | Recommendation   | Implementation   |
|--|--|--|
| <b>Improve communication between committees and key participants</b>                               | Improve communication between inquiry-based committees and the media (including through adopting the committee-specific recommendations set out in Tables 10.1–10.4).  | Committee Chairs, committee members, secretariat                         |
|  | Improve communication between committees and regular submission makers (including through adopting the committee-specific recommendations set out in Tables 10.1–10.4).  | Committee Chairs, committee members, secretariat                         |
|  | Improve communication between individual committees (including through adopting the committee-specific recommendations set out in Tables 10.1–10.4).   | Committee Chairs, committee members, secretariat staff                   |
|  | Ensure all committees prepare timely annual reports that document the full range of impact (legislative, public and hidden) the committee has on the development of new laws.  | Parliamentary offices, committee Chairs                                  |
|  | Improve communication between committees and those responsible for developing and drafting legislative proposals. This could involve committee secretariat staff liaising with public servants to develop subject-specific Guidance Notes and Drafting Directions. It could also include committee Chairs providing feedback on high-quality SoCs and EMs, or publicly praising helpful responses to committee requests for information from departments or Ministers. | Committee Chairs, committee members, secretariat, senior public servants |
|  | Undertake specific training to assist in the facilitation of respectful, deliberative public hearings. For example, specific training could be provided to inquiry-based committee Chairs and members to develop strategies to promote a culture of respect and support for a diverse range of witnesses and processes to update and expand ‘invited submission maker’ lists.  | Committee Chairs, committee members, secretariat                         |
|  | Require government responses to all Legislation Committee reports before the conclusion of second reading debate on the Bill, and to all Reference Committee reports within six months of tabling.   | Parliament   |
| <b>Increase committee resources and address high workloads to ensure timely tabling of reports</b> | Provide additional funding for to the Senate Office and House of Representatives Office to apply to the general staffing pool that services parliamentary committees. The amount of additional funding should be determined following a work analysis to determine the nature and level of secretariat support necessary for future demands on the committee system.   | Parliament   |
|  | Encourage the use of responsive staffing practices, such as shared secretariats and flexible staffing pools, which enable parliamentary staff to move between committees in response to changing workloads.  | Committee Chairs   |
|  | Encourage the appointment of high-quality, politically independent, part-time specialist advisors to support parliamentary committees over a fixed period, or for particularly complex or lengthy inquiries.   | Committee Chairs   |
|  | Encourage the use of departmental or agency secondees arrangements to support parliamentary committees over a  | Committee Chairs   |

|   |   |   |
|---|---|---|
|   | fixed period, or for particularly complex or lengthy inquiries (accompanied by the transparency arrangements recommended for the PJCIS in Table 10.2).  |   |
| <b>Encourage multi-committee scrutiny of rights-engaging Bills</b>  | Facilitate and coordinate Bill references to multiple inquiry-based committees (in addition to the technical scrutiny committees), particularly when the Bill attracts broad public interest or gives rise to rights concerns. This includes utilising existing forums for committee Chairs to meet and help coordinate multi-committee inquiries into the same Bill and amending the Standing Orders to make it clear that, when examining Bills or draft Bills, all committees should take into account any past or concurrent reports on the Bill published by any other relevant committee. | Selection of Bills Committee, committee Chairs, secretariat staff, Ministers and senior public servants, Parliament |
|   | Encourage proponent Ministers and relevant departments to refer draft Bills and discussion papers to inquiry-based committees for report prior to formally introducing the Bill into Parliament. This could be facilitated by adopting the 'Blue Paper' strategy recommended by Civil Liberties Australia in 2016.  | Relevant Ministers and senior public servants   |
|   | Support parliamentarians in their involvement in parliamentary committees, including through improving training programs for parliamentarians' staff, and profiling high-quality contributions from individual committee members.   | Parliamentary offices   |
|   | Promote parliamentary committees as part of the policy and legislative development process amongst the broader public service, including by pointing out the efficiency gains to be made by anticipating and addressing parliamentary scrutiny issues at the pre-introduction stage. This should be supported by training for all policy officers in the scrutiny criteria applied by the technical scrutiny committees.  | Parliamentary offices, senior public servants   |
|   | Amend the Standing Orders for both Houses to make it clear that, as a general rule, the second reading debate on a Bill should not proceed unless all relevant committee reports on the Bill have been tabled.  | Parliament  |
| <b>Document committees' contribution to establishing a common rights-scrutiny culture within the Parliament</b> | Invest in research to track the rights language used in parliamentary debates and parliamentary committee reports across a wide range of subject areas to evaluate the level of acceptance of the rights and scrutiny principles listed in Appendix E.  | Rights advocates, academics, commentators, parliamentarians   |
|   | Encourage individual committees to more clearly and specifically document the impact they have on the development and debate of proposed new laws, particularly those committees with specific rights-scrutiny mandates.  | Rights advocates, academics, commentators, parliamentarians   |
|   | Facilitate workshops and forums to discuss, document and debate the contribution of parliamentary committees to rights protection in Australia, for example by adopting a similar format to the public forum conducted to celebrate the tenth anniversary of the SSCSB.   | Rights advocates, academics, commentators, parliamentarians   |

## *A Improving Communication Between Committees and Key Participants*

The recommendations in Table 9.1 include a sustained focus on improving communication amongst the key participants in the parliamentary committee system. This reflects the theme emerging from Part II that a strong rights-enhancing legislative impact is dependent upon individual committees working together, which in turn demands effective communication among key participants in the system. Part II further suggests that effective communication can be particularly critical for improving the hidden impact of the technical scrutiny committees, and for improving the public impact of inquiry-based committees. For example, effective communication between the technical scrutiny committees and public servants can help entrench the criteria that committees apply when they scrutinise policy development and drafting practices. Similarly, effective communication between the inquiry-based committees and sophisticated submission makers can ensure high-quality submissions and oral testimony is received by the committee, even in the face of tight time frames.

The material in Chapters 4 and 7 also underscores the integral role the committee Chair plays in facilitating meaningful deliberative forums for scrutiny to take place, and establishing the ‘culture’ of the committee, including how decision-making processes will work in practice. The interview material further suggests that targeted support may be needed to ensure that less experienced committee Chairs are well placed to undertake this role, particularly Chairs of inquiry-based committees.<sup>6</sup> For this reason, I recommend that training be provided to inquiry-based committee Chairs and members to develop strategies to promote a committee culture where a diverse range of submission makers are encouraged and supported to participate in the inquiry process. These strategies include updating and expanding invited submission maker lists to ensure individuals and groups beyond the ‘usual suspects’ are actively encouraged to participate.

Improving communication between committee members and submission makers not only contributes to the system’s capacity to provide a deliberative forum, but can also act as a conduit for improved media coverage of the work of committees. As Chapter 6 explained, the key to generating strong media coverage is to attract and retain sophisticated submission

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<sup>6</sup> See Interview with Sophie Dunstone, former Secretary of the Senate Standing Committee on Legal and Constitutional Affairs (Canberra, 23 May 2016).



makers who proactively utilise the committee process as a key plank of a broader media strategy. Once these sophisticated submission makers regard the committee as a ‘forum of choice’, they are likely to orient their public advocacy around the committee, which in turn increases executive attention on the committee’s work. This also avoids what Larkin has described as the ‘perpetual problem’ of attracting media attention for positive committee work,<sup>7</sup> particularly when coupled with other recommendations set out in Table 9.1, such as the requirement for the relevant Ministers to respond to legislation committee reports before the conclusion of the second reading debate on the relevant Bill, and to respond to reference committee reports within six months of the date of tabling of the report.<sup>8</sup>

## *B Increasing Committee Resources and Adopting Strategies to Address High Workloads and Ensure Timely Tabling of Reports*

In line with past reviews of the federal committee system,<sup>9</sup> my recommendations include the provision of additional financial resources for committees and their staff. This is integral to the successful implementation of the other recommendations made in this thesis and would constitute an important investment in the rights-protecting capacity of the parliamentary committee system. For example, additional secretariat staff for technical scrutiny committees would facilitate further collaboration between these committees and the inquiry-based committees and assist in the development of targeted, technical scrutiny resources for public servants and drafters to use when developing new laws. Similarly, funding for additional specialist advisors for the inquiry-based committees, such as human rights experts or

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<sup>7</sup> See House of Representatives Standing Committee on Procedure, Parliament of Australia, *Building a modern committee system: An inquiry into the effectiveness of the House committee system* (2010) Dr P Larkin, *Transcript of evidence*, 22 October 2009, 6.

<sup>8</sup> This recommendation is consistent with that made in the 2010 ‘Agreement for a Better Parliament’ made between the Australian Labor Party and the independent members (Mr Tony Windsor and Mr Rob Oakeshott) on 7 September 2010, in particular para 10.6. For more information on this agreement see Parliament of Australia, ‘The Hung Parliament: procedural changes in the House of Representatives’ (Parliamentary Research Papers 2013–2014 Parliamentary Library, Parliament of Australia, 2013) <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1314/HungParliament#\\_ftn6](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/HungParliament#_ftn6)>.

<sup>9</sup> See, eg, House of Representatives Standing Committee on Procedure, *Building a modern committee system*, above n 7, Recommendation 2.

constitutional law experts, would assist in the identification of practical policy options to replace rights-abrogating provisions.

Despite its impressive contribution to the law-making function of the Australian Parliament, the committee system has experienced a decline in overall funding for several consecutive years.<sup>10</sup> Concerns about inadequate funding in the face of rapidly expanding workloads have been voiced in the recent annual reports of the Department of the Senate,<sup>11</sup> and by many of the parliamentarians interviewed for this thesis, who also cited the burden of committee work on the resources of their own offices.<sup>12</sup> The need for further support for committee members, in particular committee Chairs, was also acknowledged in the 2010 House Committee Review.<sup>13</sup>

While successive governments have been slow to respond to the call for extra funding for the parliamentary committee system, the committees themselves have begun to adopt innovative and effective strategies to ensure parliamentary committee staff are responsive to changes in workloads across system, and to maximise administrative efficiencies and resource allocation. For example, the Office of the Senate has co-located the secretariats of the SSCSB, the PJCHR and the SSCRO to form a single Legislative Scrutiny Unit,<sup>14</sup> and the PJCIS has utilised part-time specialist advisors and secondees arrangements to enhance the quality and range of resources available to parliamentary committees. Some committees have also begun to invest in efficient communication technologies and innovative new practices for holding public hearings. As set out in Table 9.1, I recommend the continuation of these types of strategies, both at the Senate and House level, in addition to the provision of extra funding to the committee system.

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<sup>10</sup> Anthony Bergin and Russell Trood, 'Creative Tension: Parliament and National Security' (Australian Strategic Policy Institute, August 2015). See also Department of the House of Representatives, Parliament of Australia, *Annual Report 2013–14* (2014); Department of the Senate, Parliament of Australia, *Annual Report 2013–14* (2014).

<sup>11</sup> See, eg, Department of the Senate, Parliament of Australia, *Annual Report 2014–15* (2015) Clerks Review, 4. Department of the Senate, Parliament of Australia, *Annual Report 2015–16* (2016) Clerks Review, 3–6.

<sup>12</sup> See, eg, Interview with Andrew Bartlett, former Australian Democrats Senator for Queensland (telephone, 4 August 2016).

<sup>13</sup> House of Representatives Standing Committee on Procedure, *Building a modern committee system*, above n 7, [2.47].

<sup>14</sup> See Interview with B (Canberra, 23 May 2016). See also Australian Parliament, 'Commonwealth Legislative Scrutiny Unit' <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Legislative\\_Scrutiny\\_Unit](https://www.aph.gov.au/Parliamentary_Business/Committees/Legislative_Scrutiny_Unit)>.

In addition to access to adequate resources, my research demonstrates that it is critical that parliamentary committees engaged in Bills scrutiny are in a position to table their reports (or at least their preliminary reports) prior to the resumption of the second reading debate on the Bill. On this basis, I recommend amending the existing Standing Orders for both Houses<sup>15</sup> to make it clear that, as a general rule, the second reading debate on a Bill should not proceed unless all relevant committee reports have been tabled. The material in Chapter 7 suggests this is already the accepted practice when it comes to the tabling of Senate committee reports on Bills that were referred to the committees via the Selection of Bills Committee, but does not always apply when it comes to the tabling of joint committee reports.<sup>16</sup>

In making this recommendation, I recognise that Standing Orders can always be changed or suspended by the majority of the relevant House of Parliament, and this is particularly likely when the legislation being considered is considered urgent or relates to national security. Nevertheless, such an order would provide a strong statement of general practice. It would help establish the expectation among parliamentarians that they should have access to the analysis prepared by parliamentary committees *prior* to reaching their conclusions on the merits of the Bill.<sup>17</sup>

### C *Encouraging Multi-committee Scrutiny of Rights-Engaging Bills*

Once armed with adequate resources and the procedural options to promote timely tabling of reports, the committees studied in this research would be well placed to respond to the demands of multi-committee scrutiny of rights-engaging Bills, such as that which occurred with respect to a number of the case study Acts. My research suggests that the greater the number of committees that scrutinised a particular case study Act, the greater the rights-enhancing results, particularly when a combination of inquiry-based and technical scrutiny committees was

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<sup>15</sup> See, eg, Senate, Parliament of Australia, *Standing Order* 25A; House of Representatives, Parliament of Australia, *Standing Order* 222.

<sup>16</sup> Department of the Prime Minister and Cabinet, *Legislation Handbook* (2017) 65, 72, 77. See also Interview with Maureen Weeks, Deputy Clerk of the Senate (Canberra, 23 May 2016); Interview with A (Canberra, 23 May 2016).

<sup>17</sup> Former Australian Democrats Senator Andrew Bartlett said that this could be further supported by raising the threshold for changing the Standing Orders to a ‘super majority’ (such as 75% or more rather than 50% of members). Interview with Andrew Bartlett, former Australian Democrats Senator for Queensland (telephone, 4 August 2016).

involved.<sup>18</sup> As Chapter 7 documents, scrutiny by multiple committees also appears to provide more opportunities for those involved in legislative development and drafting to draw upon the scrutiny principles applied by the technical scrutiny committees, and to reflect upon the outcome of past committee inquiries. As a result, this thesis recommends reforms that would encourage and facilitate scrutiny by multiple committees of the same Bill – particularly for those Bills that engage a large number of rights, or that have significant rights implications.<sup>19</sup>

The evidence in Part II also demonstrates that facilitating parliamentary committee scrutiny of proposed legislation at the draft Bill or discussion paper stage can have important rights-enhancing results.<sup>20</sup> For this reason, I recommend strategies to encourage proponent Ministers and departments to utilise relevant inquiry-based committees when developing significant, rights-engaging legislative proposals. These strategies received specific support from a number of submission makers that regularly engage with counter-terrorism Bills and who are looking for further opportunities to engage at the policy development stage. For example, Civil Liberties Australia has made its own recommendation to facilitate what it considers to be more effective public scrutiny of counter-terrorism policy, centred on the idea of a National Security Blue Paper, akin to a Defence ‘White Paper’.<sup>21</sup> As Civil Liberties Australia explains, the ‘Blue Paper’ approach would allow for parliamentary committee scrutiny of national security legislation at the pre-introduction stage, with the potential to improve the deliberative quality of law making in this area.<sup>22</sup> A number of scholars have also recommended engaging parliamentary committees more regularly in the scrutiny of proposed Bills, including Marsh and Halligan, who argue that ‘joint committees constitute a prime setting for routine review of

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<sup>18</sup> For example, see discussion of SLAT Bills, ASIO Bill 2002 and Control Orders Bill in Chapter 5, Section C.

<sup>19</sup> This recommendation is consistent with that made in the 2010 ‘Agreement for a Better Parliament’ made between the Australian Labor Party and the independent members (Mr Tony Windsor and Mr Rob Oakeshott) on 7 September 2010, particularly para 10.5. The proposals in the agreement, together with some proposals from the Greens and Mr Wilkie, formed the basis of the procedural changes in the House of Representatives in the 43rd Parliament. Most of these changes were implemented via amendments to the Standing Orders on 29 September 2010 (the second sitting day of the 43rd Parliament) and on 19 and 20 October 2010. For more information on this agreement see Parliament of Australia, ‘The Hung Parliament’, above n 8.

<sup>20</sup> See, eg, discussion of the Data Retention Bill, the National Security Legislation Amendment Bill 2010 (Cth) and the INLSM in Chapter 5, Section C.

<sup>21</sup> For further information see Civil Liberties Australia, ‘Blue Paper for Police and Spooks’, *CLArion No 1511* (online), 1 November 2015 <[http://www.cla.asn.au/clarion/1511CLArion\(1col\).pdf](http://www.cla.asn.au/clarion/1511CLArion(1col).pdf)>.

<sup>22</sup> Interview with Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016).

strategic issues’ and ‘provide a forum where official, novel, sectional and deviant or marginal opinions can be voiced’.<sup>23</sup>

When recommending changes that foresee *more* committee scrutiny of rights-engaging laws and policies, I acknowledge the need to address concerns expressed by some key participants who consider the committee system to be already overstretched.<sup>24</sup> Some have observed, for example, that large numbers of committee inquiries leads to ‘exhaustion from submitters’, fatigue among industry and community bodies and ‘exhaustion from the secretariats who are run off their feet trying to write reports’.<sup>25</sup> These concerns are shared by former Clerk of the Senate Rosemary Laing who told journalists that workload pressures for committee secretariat staff have become worse as the number of independent and minor party Senators have increased.<sup>26</sup> The interview material also points to difficulties associated with ensuring a quorum of committee members are present for key committee meetings and public hearings, particularly when individual parliamentarians may be involved in multiple committees at the same time.<sup>27</sup>

These concerns are addressed by my recommendations in two ways. First, as discussed above, I recommend a range of strategies to increase the resources available to committee secretariats, committee members and submission makers to support the system to respond effectively and efficiently to increases in workload. Secondly, I recommend the formalisation of a range of strategies already employed on an ad hoc basis to improve the process of making referrals to committees and to encourage effective collaboration between committees working on the same

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<sup>23</sup> Ian Marsh, ‘Australia’s Representation Gap: A Role for Parliamentary Committees?’ (Speech delivered at the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 26 November 2004). See also John Halligan, ‘Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level’ (2008) 23(2) *Australasian Parliamentary Review* 135, 153; Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>24</sup> See, eg, Bruce Childs, *The Truth About Parliamentary Committees*, Parl Paper No 18 (1992)

<sup>25</sup> Patricia Crossin, Christine Milne and Gary Humphries, ‘The Future of Senate Committees: Challenges and Opportunities’ in Commonwealth, *Senate Committees and Government Accountability*, Parl Paper No 54 (2010) 134.

<sup>26</sup> Phillip Thompson, ‘Department of the Senate Dealing with Too Many Inquiries’, *The Canberra Times* (online), 28 February 2016 <<http://www.canberratimes.com.au/national/public-service/departments-of-the-senate-dealing-with-too-many-inquiries-20160207-gmo4pj.html>>.

<sup>27</sup> Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

Bill. For example, like ALP Senator Patricia Crossin<sup>28</sup> and former Australian Greens Senator Christine Milne,<sup>29</sup> I recommend utilising existing forums for committee Chairs to meet and help coordinate multi-committee inquiries into the same Bill. I further recommend that this practice be supported by changes to the Standing Orders to make it clear that, when examining Bills or draft Bills, all committees should take into account any past or concurrent reports on the Bill published by any other relevant committee.<sup>30</sup> Senate Standing Order 40, which governs meetings with House committees, could also be amended to facilitate more flexible opportunities for Senate committees to discuss inquiries with their House and joint committee counterparts.<sup>31</sup> These changes would help target the ‘submission-maker fatigue’ described above by providing transparent options for individual committees to draw upon submissions made to other committees, or by facilitating shared committee hearings, where members from two committees would be permitted to attend the same public hearing and question witnesses.

In addition to these strategies, I support efforts to review the number of individual committees across both Houses of Parliament with a view to rationalising this number if it is shown to be unworkably large. When taken together, these strategies have the potential to capitalise on the rights-enhancing impact and other benefits that flow from multi-committee scrutiny of rights-engaging laws, whilst at the same time guarding against adding unnecessarily to the heavy workload experienced by committee members and secretariat staff.

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<sup>28</sup> Milne, Crossin and Humphries, above n 25, 138–9.

<sup>29</sup> Ibid 134. Senate, Parliament of Australia, *Standing Order* 25(10) (15 July 2014) provides that ‘The chairs of the committees, together with the chairs of any select committees appointed by the Senate, shall constitute the Chairs’ Committee, which may meet with the Deputy President in the chair, and may consider and report to the Senate on any matter relating to the operations of the committees.’

<sup>30</sup> This could be based on existing Senate, Parliament of Australia, *Standing Order* 25(2A) (15 July 2014).

<sup>31</sup> Senate, Parliament of Australia, *Standing Order* 40 (24 August 1994) currently provides: ‘(1) A committee may not confer or sit with a committee of the House of Representatives except by order of the Senate. (2) When such an order has been made, it shall be communicated by message to the House of Representatives with a request that leave be given to the committee of that House to confer or sit with the committee of the Senate. (3) A committee permitted or directed to confer with a committee of the House of Representatives may confer by writing or orally. (4) Proceedings of a conference or joint sitting of a committee of the Senate and a committee of the House of Representatives shall be reported to the Senate by its committee.’ A similar recommendation was previously made with respect to the Standing Orders of the House of Representatives. See House of Representatives Standing Committee on Procedure, *Building a modern committee system*, above n 7.

## D *Documenting and Acknowledging the Contribution Parliamentary Committees Make to a Common Rights-Scrutiny Culture within the Australian Parliament*

As part of my evaluation of the role of parliamentary committees in the parliamentary model of rights protection, my research has uncovered evidence of an emerging rights-scrutiny culture at the federal level. It suggests that the federal Parliament may already be in the process of developing its own set of rights and scrutiny principles that can be built upon and enhanced when seeking to improve the existing parliamentary model of rights protection.<sup>32</sup>

The evidence presented in Chapters 5 and 6 describes the rights and scrutiny principles that were most commonly discussed when Parliament debated the case study Acts, suggesting that it may be possible to identify a common set of rights and scrutiny principles that a wide range of parliamentarians, public servants and submission makers consider to be important when evaluating the merits of a proposed law. These principles are summarised at Appendix E and include:

- The expansion of executive power must come with procedural fairness guarantees, including access to legal representation, preservation of common law privileges and access to judicial review.<sup>33</sup>
- Parliament should have access to information about how government departments and agencies are using their powers.<sup>34</sup>
- If the law is designed to respond to an extraordinary set of circumstances, Parliament should be required to revisit the law to determine whether it is still needed.<sup>35</sup>

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<sup>32</sup> See discussion in Chapter 8.

<sup>33</sup> See, eg, LCA Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 4; LCA Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) ch 3 (key issues summarised at [3.22]); SSCSB, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014).

<sup>34</sup> See, eg, PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) vii; LCA Legislation Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* (2008); PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015) Recommendation 10.

<sup>35</sup> See, eg, PJCIS, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendation 13; PJCHR, Parliament of Australia, *Thirteenth Report of 2014* (2014); Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory*

- New criminal offences should have clearly defined physical and mental elements, allocate the burden of proof to the prosecution, ensure access to legal representation, and not apply retrospectively.<sup>36</sup>

These rights and scrutiny principles feature prominently in the work of parliamentary committees, have a particularly strong connection to the scrutiny criteria applied by the SSCSB, and align closely with the features and functions of the Australian Parliament<sup>37</sup> and the common law ‘bill of rights’ as well as established constitutional doctrines.<sup>38</sup> For example, many of the principles listed in Appendix E, such as the need to ensure parliamentary oversight of executive powers and the use of sunset clauses for extraordinary laws, are drawn directly from Parliament’s constitutional role in holding the executive government to account, and reflect the doctrine of parliamentary sovereignty.<sup>39</sup> The principles also reflect the doctrine of separation of powers reflected in Chapter 3 of the *Constitution*, such as those concerning access to meaningful judicial review of executive action, and limitations on the use of executive power.<sup>40</sup>

Taken together, this material suggests that there is a positive relationship between the features and functions of the Parliament discussed in Chapter 3 and the emerging rights-scrutiny culture discussed in Chapter 6. This may seem like an obvious conclusion to draw; however, it is important to keep these findings in mind when developing and evaluating options for improving the parliamentary model of rights protection in Australia. This is because, when

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*Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendation 12.

<sup>36</sup> See, eg, Anti-Terrorism Bill (No 2) 2005, Schedule of the amendments made by the Senate, Items 68–72; SSCSB, Parliament of Australia, *Alert Digest No 13 of 2005* (9 November 2005) 8, 14–16; SSCSB, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

<sup>37</sup> These features include the doctrine of responsible government and the separation of powers, which are discussed in Chapter 3.

<sup>38</sup> The ‘common law Bill of Rights’ is discussed briefly in Chapter 1. It includes common law privileges such as legal professional privilege, which has been the subject of a number of committee-led legislative amendments to the case study Acts. See, eg, Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth), Item 27.

<sup>39</sup> For example, by focusing on increasing parliamentary oversight of elective powers and mandating parliamentary review of proposed provisions, for example through the use of sunset clauses. See further discussion in Chapters 6 and 8 and Appendices D and E.

<sup>40</sup> For commentary on the relationship between Chapter III of the constitution and the use and review of executive power see, eg, Anthony Gray, *Criminal due process and Chapter III of the Australian Constitution* (Federation Press, 2016); Elizabeth Price Foley, ‘Judicial Engagement, Written Constitutions, and the Value of Preservation: the Case of Individual Rights’ (2012) 19(4) *George Mason Law Review* 909.



viewed optimistically, this emerging rights-scrutiny culture may provide fertile ground on which to establish a more concrete statement of Australian rights that resonate across political lines and can be readily incorporated into parliamentary discourse. Such an approach aligns with the 2006 (pre-PJCHR) recommendations made by Evans and Evans,<sup>41</sup> who saw benefits in developing a ‘home-grown’ set of rights at the federal level rather than adopting a human rights Act approach,<sup>42</sup> and with the ‘democratic bill of rights’ model advocated by Campbell and discussed further below. The recommendations made following the National Consultation also supported the development of an ‘Australian statement of human rights’, as an alternative to replicating the provisions of the international human rights conventions when enacting a federal human rights Act or other legal statement of rights.<sup>43</sup> As noted above and discussed further below, building upon this emerging rights-scrutiny culture may also hold advantages over other approaches to articulating and promoting a lists of rights, as it feeds into rather than disturbs the existing institutional framework for resolving rights disagreements that exists at the federal level.

The significance of this emerging rights-scrutiny culture for future evaluations of Australia’s parliamentary model of rights protection is discussed in Chapter 11. However, it must also be emphasised that the rights-scrutiny principles listed in Appendix E were derived from the experience of four committees considering 12 counter-terrorism Acts and may not illuminate the true nature of the rights-scrutiny culture within the federal Parliament. As noted in Chapter 1, the counter-terrorism case study concerns a highly dynamic area of law making that is responsive to unpredictable international and domestic events, and formal parliamentary scrutiny of other areas of law by other committees may generate different results. Because of this, I recommend further research to document the rights-scrutiny culture across a range of different subject areas, and across the full range of parliamentary committees. In line with the key findings of my research, I recommend that, when conducting this further research, scholars

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<sup>41</sup> Carolyn Evans and Simon Evans, ‘Evaluating the Human Rights Performance of Legislatures’ (2006) 6 *Human Rights Law Review* 545; Carolyn Evans and Simon Evans, *Australian Parliaments and the Protection of Human Rights*, Parl Paper No 47 (2007).

<sup>42</sup> Carolyn Evans and Simon Evans, *Australian Parliaments and the Protection of Human Rights*, Parl Paper No 47 (2007).

<sup>43</sup> National Human Rights Consultation, *National Human Rights Consultation: Report* (2009) Recommendation 5, xxx–xxxi.

focus on the contribution of the *system* of committees working together, rather than evaluating individual committees within the system.

### E *Summary of System-Wide Reforms*

In summary, the changes to the system of parliamentary committees I recommend aim to make modest adjustments to the way individual committees work together to maximise the opportunities for committees to have a rights-enhancing influence on proposed federal laws. My recommendations do this by boosting the funding and human resources available to committee secretariats to support meaningful deliberation on rights-engaging Bills, and to facilitate expert technical analysis on a timely basis. My recommendations also encourage committees to embrace new ways of communicating with each other and their key participants, including submission makers and public servants. This includes the provision of resources and information that is accessible and useful for those tasked with providing government with policy guidance on rights-engaging laws and drawing public attention to rights-abrogating provisions. When taken together, and supported by the committee-specific recommendations set out in Chapter 10, these changes respond to the findings in Part II about the rights-enhancing impact parliamentary committees had on the case study Acts, and also recognise the place parliamentary committees hold in the broader parliamentary system, as considered in Part I. The next chapter completes this picture by setting out the committee-specific changes recommended in this research.

## CHAPTER 10: REFORM OPTIONS FOR INDIVIDUAL COMMITTEES

The recommendations set out in Chapter 9 focus on improving the capacity of the system of parliamentary committees to contribute to rights protection in Australia, having regard to particular strengths and weaknesses of the four committees studied in this thesis. This chapter completes the picture by setting out the changes recommended for the four individual committees studied.

These recommendations have been formulated on the basis of the evidence presented in Part II of this thesis, occasionally drawing from past recommendations made by other studies of particular parliamentary committees, but more commonly supported by the interview material obtained from those with direct experience working with the particular committees studied. They are presented in table format in Tables 10.1–10.4 and discussed in further detail below, with reference to the strengths and weaknesses of the four parliamentary committees studied. When integrated with the recommendations set out in Chapter 9, these changes present a new perspective on the role of parliamentary committees in Australia’s parliamentary model of rights protection, discussed further in Chapter 11.

**Table 10.1: Reform Options for the LCA Committees**

| <b>Aim</b>   | <b>Recommendation</b>  | <b>Implementation</b>  |
|--|--|--|
| <b>Enhance the deliberative quality of the inquiry process</b>   | Formalise and actively build upon existing databases of potential submission makers so that direct invitations to be involved in committee work are distributed more consistently to a broader range of potentially interested parties.  | Committee Chair, secretariat staff                                 |
|  | Formalise processes for selecting witnesses for public inquiries to guard against unconscious bias or preference for ‘usual suspects’.   | Committee Chair, secretariat staff                                 |
|  | Invest in online materials and secretariat staff capacity to support submission makers and witnesses, particularly new witnesses, for example by: <ul style="list-style-type: none"> <li>o utilising the LCA Committees’ existing website to provide: <ul style="list-style-type: none"> <li>▪ examples of high quality submissions;</li> <li>▪ video content to convey the ‘typical’ witness experience;</li> <li>▪ lists of tips for what committee members find useful in submissions and oral hearings; and/or</li> <li>▪ a FAQ page for new submission makers and witnesses with links to more experienced organisations to help establish mentor relationships;</li> </ul> </li> <li>o facilitating regular workshops for regular and new submission makers and witnesses; and</li> <li>o establishing a modest hardship fund to support non-government witnesses travelling from regional or remote locations to attend public hearings in person.</li> </ul> | Senate Office, committee Chair, secretariat staff                  |
|  | Invest in reliable video communication technologies in capital cities and regional centres to facilitate remote access public hearings. This could be supported by the interim use of video conferencing facilities provided by ‘host’ organisations, such as local councils or public libraries.  |  |
| <b>Increase LCA Committee engagement with draft Bills and discussion papers</b>                            | Liaise with proponent Ministers and the AGD to encourage the referral of draft Bills or discussion papers to the LCA Committees for consideration.   | Committee Chair  |
| <b>Encourage and support the LCA Committees to continue to engage with counter-terrorism related Bills</b> | Demonstrate the impact of LCA Committee inquiries by documenting and reporting on the government response to and legislative implementation of the committees’ recommendations, for example through annual report and more instantaneous platforms including social media and direct email through a subscription alert service.   | Committee Chair, secretariat staff                                 |
|  | Proactively engage with regular submission makers, for example through a biannual workshop, to convey the importance of multiple committee scrutiny of rights-engaging Bills.  | Committee Chair, secretariat staff, submission makers              |
|  | When receiving a reference into a Bill that has also been referred to the PJCIS, require the Chairs and Secretaries of both committees to discuss options for appropriate collaboration, which could include: <ul style="list-style-type: none"> <li>a. coordinating submission deadlines to ease pressure on submission makers;</li> <li>b. ‘sharing’ public submissions in an open and transparent way – for example by alerting all submission makers that their submissions will be considered by the other committee;</li> </ul>  | Committee Chair (LCA and PJCIS), secretariat staff (LCA and PJCIS) |

|  |  |  |
|--|--|--|
|  | <ul style="list-style-type: none"> <li>c. coordinating public hearings – which could include holding ‘joint hearings’ – to ensure a wide range of witnesses can be heard; and/or</li> <li>d. agreeing that only one committee will hold public hearings, but that both committees will have access to hearing transcripts and will table substantive reports.</li> </ul> |  |
| <b>Address workload pressures</b>  | Increase the overall staffing levels of the Senate Office to support the existing practice of allocating additional staff to the LCA Committees when dealing with multiple or complex references (see also recommendations in Chapter 9).  | Senate Office  |
|  | Appoint a part-time specialist advisor to assist the LCA Committees, in a similar way as the Legal Advisor assists the SSCSB and PJCHR.  | Committee Chair, Senate Office   |
|  | Liaise with government departments, particularly the AGD and DIPB, to facilitate transparent secondee relationships for particularly large or complex Bills inquiries or references.   | Committee Chair, secretariat, AGD, DIPB and related departments            |
|  | Continue to utilise the LCA Committees’ existing subcommittee power to ensure sufficient members are able attend public hearings.  | Committee Chair, secretariat   |
| <b>Encourage collaboration with committees with rights-specific mandates</b> | Encourage early and explicit consideration of PJCHR and SSCSB and structure reports to highlight key rights issues.  | Committee Chair (LCA, PJCHR, SSCSB), secretariat staff (LCA, PJCHR, SSCSB) |
|  | Liaise with SSCSB and PJCHR to develop and publish specific Guidance Notes on the rights issues commonly arising from the LCA Committees’ work.  | Committee Chairs, secretariat staff  |
|  | Explicitly acknowledge reliance on PJCHR and SSCSB reports in PJCIS reports and encourage committee members to use these sources as the basis for questions for witnesses at public hearings.  | Committee Chair, committee members   |
|  | Incorporate the PJCHR’s analytical approach into training and induction processes for secretariat staff and new committee members and secondees.   | Committee Chair, secretariat staff   |

## A LCA Committees

As noted above, the LCA Committees’ strengths centre on their capacity to provide a meaningful deliberative forum by attracting a large number of diverse submission makers and witnesses to public inquiries, and by involving a diverse range of parliamentarians as members.<sup>1</sup> The LCA Committees’ ability to engage a diverse range of Senators as members

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<sup>1</sup> This capacity to attract a wide range of diverse public participation in its processes has been cited by other key participants as a strong indicator of effectiveness. See, eg, Kerry Sibraa, ‘Session One: The Revolutionary Proposals of the 1970s’ (Keynote Address at Conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees, Canberra, 3 October 1990). See also John Halligan, ‘Parliamentary Committee Roles in Facilitating Public Policy’ (2008) 23(2) *Australasian Parliamentary Review* 135, 147–8; See also Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

and as participating members is also an important strength.<sup>2</sup> These strengths help the LCA Committees attract attention to the key rights issues arising from the Bills they scrutinise through their public inquiry function. The evidence in Chapter 6 also suggests that these committees can have a long-term impact on the shape of future legislative reforms by preparing reports that include alternative policy proposals that are subsequently adopted and reflected in new policy proposals or draft Bills.<sup>3</sup>

In light of these strengths, I recommend changes that enhance the deliberative quality of the LCA Committees' inquiries and increase the LCA Committees' engagement with draft Bills and discussion papers. These changes reflect suggestions made in the course of interviews with past LCA Committees members, secretariat staff<sup>4</sup> and key submission makers.<sup>5</sup> They include formalising processes for selecting witnesses to inquiries to ensure a broad range of interested parties are consistently involved; improving feedback processes between submission makers and the committee's secretariat staff; and encouraging the referral of draft Bills or discussion papers to the committees for consideration.

My recommendations also call for improved reporting by the LCA Committees on government responses to their reports and legislative implementation of their key recommendations. This would allow key participants to have a stronger sense of the overall impact of the LCA Committees on proposed laws, and further support and encourage high-quality participation among parliamentarians, public servants and submission makers. Currently, outside of academic analysis such as this thesis, it is difficult to access this type of information, particularly for the LCA Committees, which do not publish their own annual reports.

The evidence in Part II also highlights that in some areas the LCA Committees are struggling to have a consistently strong impact. In particular, since 2013, the LCA Committees have not

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<sup>2</sup> See, eg, Halligan, above n 1, 155.

<sup>3</sup> An example of this longer-term impact can be seen with respect to the *National Security Legislation Amendment Act 2010* (Cth). See discussion in Chapter 6.

<sup>4</sup> See, eg, Interview with Sophie Dunstone, former Secretary of the LCA Committees (Canberra, 23 May 2016); Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>5</sup> See, eg, Interview with Lydia Shelly, Muslim Legal Network (telephone, 2 June 2016); Interview with Kris Klugman and Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016); Interview with a former senior member of an oversight body (telephone, 8 November 2016).

been engaged in any public inquiries relating to counter-terrorism Bills, with government members of the LCA Committee deferring consideration of these Bills to the PJCIS. Some may consider this a sensible approach, given the very high workload facing the LCA Committees and the general demands placed on committee members and secretariat staff to respond to the increasing number of references parliamentary committees receive.<sup>6</sup> However, this thesis argues that, at least when it comes to rights-engaging Bills, the LCA Committees' deference to the PJCIS is a worrying trend. This is because the evidence in Part II clearly shows that the most substantial, rights-enhancing impacts occur when multiple parliamentary committees consider a Bill. This was the case for the SLAT Bills, the ASIO Bills and the Control Order Bills, which were reviewed by at least two inquiry-based committees,<sup>7</sup> in addition to the regular scrutiny conducted by the SSCSB and later the PJCHR. For this reason, I recommend that reforms be implemented to encourage the LCA Committees to continue to accept and act upon counter-terrorism related references and desist the recent practice of deferring inquiries into such Bills to the PJCIS.<sup>8</sup>

In recognition of the need to address the demanding workload faced by less-specialised committees such as the LCA Committees,<sup>9</sup> I also recommend the introduction of strategies to provide practical support for LCA Committees and their secretariat. For example, I recommend that the LCA Committees adopt the secondee approach utilised so effectively by the PJCIS and available to the LCA Committees under existing Standing Orders.<sup>10</sup> As discussed in Chapter

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<sup>6</sup> See, eg, Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016); Greg Jennett, 'Record Crossbench a Headache for Stressed Senate Budget, Workload', *ABC Online*, 22 August 2016 <<http://www.abc.net.au/news/2016-08-22/jennett-senate-committee-inquiries/7765838>>.

<sup>7</sup> These Bills are discussed in detail in Chapter 5.

<sup>8</sup> This recommendation is also supported by interviews conducted with a range of submission makers who preferred the experience of appearing before the LCA Committees to that of the PJCIS: Interview with Lydia Shelly, Muslim Legal Network (telephone, 2 June 2016); Interview with Kris Klugman and Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016). It is also supported by the findings in Part II that the LCA Committees attract a more diverse range of participants and enjoy legitimacy according to a broader range of participants than the PJCIS.

<sup>9</sup> This high workload was noted in Part II. See also Sophie Dunstone, former Secretary of the Senate Standing Committee on Legal and Constitutional Affairs (Canberra, 23 May 2016); Interview with Patricia Crossin, former Chair and Deputy Chair of the Senate Standing Committee on Legal and Constitutional Affairs, former Australian Labor Party Senator for Northern Territory (telephone, 10 August 2016).

<sup>10</sup> Senate, Parliament of Australia, *Standing Order* 25(17) (15 July 2014) provides that 'A committee shall be provided with all necessary staff, facilities and resources and shall be empowered to appoint persons with specialist knowledge for the purposes of the committee, with the approval of the President.'

4, the use of secondees can help build relationships of trust between a committee and the executive, which can in turn increase the likelihood of the committee's recommendations being reflected in legislative amendments.<sup>11</sup>

In addition to addressing workload issues, my recommendations above also seek to improve the LCA Committees' capacity to collaborate with other committees, particularly those that are able to provide the LCA Committees and their submission makers with timely rights-specific analysis. For example, I recommend that the LCA Committees (or at least their secretariat staff) liaise with SSCSB and PJCHR to develop specific Guidance Notes on rights issues that commonly arise in their work, such as parliamentary oversight of the use of executive power to prescribe places or organisations, and the type of safeguards necessary to ensure those suspected of engagement in terrorist activity have access to procedural fairness and natural justice. This would help ensure that the materials published by the SSCSB and the PJCHR are well tailored to the work of inquiry-based committees and their submission makers, which would in turn increase the rights-enhancing capacity of the committee system<sup>12</sup>

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<sup>11</sup> Indeed, it appears that the LCA Committees have in the past made use of such arrangements in their work. Commonwealth, *Senate Committees and Government Accountability*, Parl Paper No 54 (2010). See in particular former Senator the Hon Nick Minchin, 'Committees Under a Government-Controlled Senate: Lessons From 2005–08', exchange between Chair (Mr John Carter) and Clerk of the House Robyn McClelland.

<sup>12</sup> This is consistent with feedback from parliamentary counsel and public servants about the utility of well-targeted guidance material prepared by the SSCSB, discussed in Chapter 7.



**Table 10.2: Reform Options for the PJCIS**

| Aim   | Recommendation  | Implementation  |
|---|---|---|
| <b>Enhance and document strong legislative impact</b>                 | Continue to document and report on government responses to and legislative implementation of Committee recommendations in Annual Reports and more immediate means such as social media and subscription based email alert system.   | Committee Chair, secretariat staff  |
|   | Encourage committee members to explicitly refer to the work of the PJCIS and the contribution of submission makers and witnesses in parliamentary debates.  | Committee Chair, committee members  |
|   | Continue to invest in additional resources for Secretariat Staff and committee members faced with significant increases in statutorily prescribed workloads.  | Senate Office   |
|   | Maintain and strengthen the development of legal and counter-terrorism expertise within PJCIS, particularly for new members and new Secretariat staff, for example through training, liaison with international counter-parts and regular formal and informal meetings with OIL and relevant intelligence and law enforcement agencies.   | Committee Chair, secretariat staff, law enforcement and intelligence agencies |
| <b>Improve transparency of relationships with Government agencies</b> | Continue to utilise secondees arrangements, and expand to include a broader range of policy and operational experts, including human rights experts and constitutional law experts where appropriate.   | Committee Chair, secretariat staff, AGD                                       |
|   | <p>Improve the transparency of secondees arrangements by:</p> <ul style="list-style-type: none"> <li>Publicly confirming that the secondee is not answerable to the proponent Minister at any time when seconded to the committee;</li> <li>Acknowledging in each report and before each public hearing that the Committee is utilising the expertise of a secondee from X agency or Department;</li> <li>Ensuring that the secondee has <i>not</i> been involved in the development of the legislative proposal or legislative proposal approval process, prior to being seconded to the committee;</li> <li>Disclosing the secondee as the source of any information relied upon by the Committee when making findings or recommendations in its report;</li> <li>Excluding the secondee from private meetings conducted by the Committee; and</li> <li>Seeking feedback from non-government submission makers and witnesses about the use of secondees.</li> </ul> | Committee Chair, secretariat staff, committee members                         |
|   | <p>Continue to enhance the PJCIS's working relationships with oversight bodies by:</p> <ul style="list-style-type: none"> <li>Coordinating statutory mandated reviews and reporting requirements where possible</li> <li>Inviting the IGIS, INSLM, and Ombudsman to give evidence at public inquiries into Bills as a matter of course, and ensuring evidence is given as part of a public inquiry (even if a closed hearing is also required)</li> <li>Requesting additional briefings from the IGIS, INSLM, or Ombudsman when seeking to give effect to or depart from the specific</li> </ul>  | Committee Chair, secretariat staff, oversight bodies                          |

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|  | recommendations for legislative change made by these oversight bodies.   |  |
| <b>Encourage a diverse range of submission makers to public inquiries</b>    | Formalise and actively build upon existing databases of potential submission makers so that invitations to be involved in committee work are distributed more consistently to a diverse range of potentially interested parties. | Committee Chair, secretariat staff   |
|  | Formalise processes for selecting witnesses for public inquiries to guard against unconscious bias or preference for 'usual suspects'.   | Committee Chair, secretariat staff   |
|  | Invest in materials and Secretariat staff capacity to support submission makers and witnesses, particularly new witnesses, for example by adopting the strategies recommended with respect to the LCA Committees above.          | Senate Office  |
| <b>Encourage collaboration with committees with rights specific mandates</b> | Encourage early and explicit consideration of PJCHR and SSCSB reports to help structure draft PJCIS Reports and isolate key rights issues.   | Committee Chairs (PJCIS, PJCHR, SSCSB), secretariat staff (PJCIS PJCHR, SSCSB) |
|  | Liaise with SSCSB and PJCHR to develop specific Guidance Notes on the rights issues commonly arising from the work of the PJCIS.   | Committee Chairs (PJCIS, PJCHR, SSCSB), secretariat staff (PJCIS PJCHR, SSCSB) |
|  | Explicitly acknowledge reliance on PJCHR and SSCSB reports in PJCIS reports and encourage committee members to use these reports as the basis for questions for witnesses at public hearings.                                    | Committee Chair, committee members   |
|  | Incorporate the PJCHR's analytical approach into training and induction processes for Secretariat staff and new committee members and secondees  | Committee Chair, secretariat staff   |

## B *PJCIS*

Part II of this thesis highlighted the many comparative strengths of the PJCIS, including its particularly strong legislative impact on the case study Acts since 2013. It highlighted the PJCIS's strong, positive working relationships with government departments, key law enforcement and intelligence agencies, sophisticated submission makers and oversight bodies. It also explained how the majority-party-controlled membership of the PJCIS can help facilitate the effective negotiation of recommended legislative reforms to address rights concerns. Part II also documented the PJCIS's expanding statutory oversight and legislative review role, and explained why the PJCIS may have replaced the LCA Committees as a forum of choice for review of counter-terrorism Bills. Chapter 8 explained how these features combine to give the PJCIS a number of advantages when it comes to rights-enhancing impact.

However, the evidence presented in Part II also suggests that the PJCIS may suffer from shortcomings and potential threats to its future legitimacy, often precisely because of the

unique character of its relationship with government and its agencies. The PJCIS's secondee arrangements, for example, have attracted negative feedback from some submission makers and oversight bodies,<sup>13</sup> despite contributing significantly to the committee's strong legislative impact. For this reason, I recommend changes to improve the transparency of secondee arrangements, such as ensuring that the secondee has *not* been involved in the development of the legislative proposal or legislative proposal approval process<sup>14</sup> and disclosing the secondee as the source of any information relied upon by the committee when making findings or recommendations in its report.

Like the LCA Committees, the PJCIS also lacks a clear rights-scrutiny mandate,<sup>15</sup> meaning that it is often reliant upon submission makers, and the work of the SSCSB and the PJCHR, for consistent and detailed rights-specific analysis. For this reason, a number of changes to the PJCIS's processes and practices are recommended to encourage a more diverse range of participants to the PJCIS inquiries and to ensure that the PJCIS and its submission makers have timely access to high-quality human rights analysis from the technical scrutiny committees. For example, I recommend changes to promote liaison between the PJCIS and the technical scrutiny committees to ensure that Guidance Notes and scrutiny reports are well tailored to the needs of the PJCIS. These recommendations share features in common with those made by other commentators, including former PJCIS member, former Senator John Faulkner<sup>16</sup> and the Australian Strategic Policy Institute.<sup>17</sup> They also align with recommendations made by the Department of Prime Minister and Cabinet's 2017 Independent Intelligence Review.<sup>18</sup>

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<sup>13</sup> See, eg, Interview with Kris Klugman and Bill Rowlings, Civil Liberties Australia (Canberra, 24 May 2016); Interview with a former senior member of an oversight body (telephone, 8 November 2016).

<sup>14</sup> See discussion in Chapter 4; see also Interview with a former senior member of an oversight body (telephone, 8 November 2016).

<sup>15</sup> As discussed in Chapters 7 and 8, I do not see this as inappropriate and do not recommend that it be changed, rather it is a characteristic of the PJCIS to which my recommendations are attuned.

<sup>16</sup> John Faulkner, 'Surveillance, Intelligence and Accountability: an Australia Story' (Senate Occasional Paper, Parliamentary Library, Parliament of Australia, 2014). Note that a number of Mr Faulkner's recommendations have already been adopted, for example extending the PJCIS's functions to include a role in the oversight of the counter-terrorism functions of the AFP. See, eg, *Intelligence Services Act 2001* (Cth) s 29(1)(bab).

<sup>17</sup> Russell Trood and Anthony Bergin, 'Creative Tension: Parliament and National Security' (Australian Strategic Policy Institute, August 2015).

<sup>18</sup> Department of Prime Minister and Cabinet, *Independent Intelligence Review* (2017) 8–9, 118–25, Recommendations 21 and 23. For example, this review recommended that the PJCIS be empowered to: review all proposed reforms to counter-terrorism and national security legislation and review all such expiring legislation (recommendation 23(b)); initiate its own inquiries into proposed or existing counter-terrorism and national

By adopting the changes set out in detail in Table 10.2, I argue that the tensions between the PJCIS's authoritative and deliberative role discussed in Chapter 4 can be minimised, without compromising the PJCIS's unique strengths, identified in Chapter 8.

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security laws (recommendation 23(c); request briefings from the INSLM and ask the INSLM to provide the PJCIS with a report on matters referred by the PJCIS and to coordinate reports on national security legislation (recommendation 23(d)).

**Table 10.3 Reform Options for the SSCSB**

| <b>Aim</b>   | <b>Recommendation</b>  | <b>Implementation</b>                               |
|--|--|---|
| <b>Enhance and document strong hidden impact</b>     | Document and report on the extent to which SSCSB publications have been incorporated into formal guidance materials for public servants and parliamentary counsel, including in the <i>Legislation Handbook</i> , Drafting Directions and the Guide to Framing Commonwealth Offences.  | Secretariat   |
|  | Prioritise the development of targeted Guidance Notes, focusing on the most common rights-related concerns that arise in the SSCSB's reports. This guidance material should be developed in close consultation with parliamentary counsel and instructing departments and be subject to public review.   | Committee Chair, secretariat                        |
|  | Proactively utilise the power in Senate Standing Order 24(1)(b) to scrutinise exposure drafts of proposed legislation and provide specific rights-scrutiny advice to departments at the pre-introduction stage.  | Committee Chair, relevant Ministers and departments |
| <b>Encourage collaboration with other committees</b> | Liaise with the inquiry-based committees to identify what SSCSB publications are most useful to these committees when undertaking inquiries into rights-engaging Bills and prioritise the development of Guidance Notes that address any needs of the inquiry-based committees for reliable, 'technical' analysis of commonly arising rights or scrutiny concerns.   | Committee Chair, secretariat                        |
|  | Document and report on instances when the SSCSB has been quoted in an inquiry-based committee report.  | Secretariat   |
|  | Continue to issue timely Alert Digests in short, accessible format. The tabling of Bill-specific Alert Digests should be encouraged for particularly complex or rights-concerning Bills.   | Committee Chair, secretariat                        |
|  | Compile a database of SSCSB's findings and recommendations that allows the SSCSB's Alert Digests and reports to be searched thematically or by key word to improve access to key elements of the SSCSB's reports, and allow analysis of the SSCSB's findings on particular rights issues over time. This could include a link from the Bill's homepage to any relevant Alert Digest or report which comments on that Bill. | Secretariat   |
|  | Be explicit about the connection between the SSCSB scrutiny criteria and that of the PJCHR in all SSCSB publications.  | Committee Chair, secretariat                        |
|  | Liaise regularly with the Chair and secretariat staff of the PJCHR with a view to preparing joint (or at least complementary) Guidance Notes on areas of common concern, such as retrospectivity, access to judicial review and procedural guarantees.   | Committee Chair, secretariat                        |
|  | Utilise Senate Standing Order 24(7) to actively encourage public input into the development of Guidance Notes and other SSCSB publications.  | Committee Chair, secretariat                        |
| <b>Encourage timely ministerial responses</b>        | 'Name and shame' delayed responses from proponent Ministers to reasonable requests for information by the committee, for example by utilising recently amended Standing Order 24(1)(d)–(g) to publicise late responses to requests for information and to demand an explanation from the proponent Minister in Parliament.   | Committee Chair                                     |
|  | Publish Alert Digests and reports during non-sitting periods in appropriate cases, for example by adopting a provision similar to Standing Order 38(7) that currently permits this approach for other Senate committees.   | Committee Chair, secretariat                        |

## C SSCSB

As discussed in Chapter 8, the SSCSB's strengths lie in its strong hidden impact on the case study Acts, and in the high levels of legitimacy it attracts across key participants in the parliamentary scrutiny system. As an interviewee said, the SSCSB is 'part of the Senate furniture'.<sup>19</sup>

These strengths are preserved and enhanced by the above recommendations, which aim to further enhance the role of the SSCSB in policy development and legislative drafting, including by developing new, rights-focused guidance material that provides clear legislative options for public servants seeking to avoid negative scrutiny by the SSCSB.<sup>20</sup> For example, Guidance Notes could be prepared on topics including access to meaningful judicial review of executive decisions or the type of safeguards necessary to protect against undue interference with individual privacy by law enforcement or intelligence officers.<sup>21</sup> I also recommend that the SSCSB take better advantage of its power in Senate Standing Order 24(1)(b) to scrutinise exposure drafts of proposed legislation. This would amplify the committee's existing strong behind-the-scenes impact by providing specific rights-scrutiny advice to departments at the pre-introduction stage.

The above recommendations are also focused on increasing the SSCSB's opportunities to interact meaningfully with other parliamentary committees in the system. These recommendations echo those made above for the LCA Committees and the PJCIS, and encourage the SSCSB to work with these inquiry-based committees to identify what Guidance Notes are most useful when undertaking public inquiries into rights-engaging Bills. It is further recommended that the SSCSB keep a 'running record' of the instances when the SSCSB has

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<sup>19</sup> Interview with A (Canberra, 23 May 2016). See also Brian Halligan, 'Session Four Senate Committees: Can they Halt the Decline of Parliament?' (Keynote Address at Conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees, Canberra, 3 October 1990); John Uhr, *Keeping Government Honest: Preconditions of Parliamentary Effectiveness*, Parl Paper No 29 (1995) 51, 59–60; Chris Puplick, 'Session One: The Revolutionary Proposals of the 1970s' (Keynote Address at Conference to mark the twentieth anniversary of Senate Legislative and General Purpose Standing Committees and Senate Estimates Committees, Canberra, 3 October 1990).

<sup>20</sup> This is supported by evidence from public servants and parliamentary counsel about the utility of previous SSCSB guidance materials, and the documentary evidence showing how these notes were used in Drafting Directions and policy guidance materials for the AGD. These matters were discussed in detail in Chapter 7.

<sup>21</sup> These issues arise regularly in SSCSB reports, but also in inquiry-based committee reports on counter-terrorism laws. For examples, see Chapters 3 and 5.

been quoted in an inquiry-based committee report,<sup>22</sup> as means of highlighting the existing rights-enhancing contribution made by the SSCSB, and improving the relevance of the SSCSB's publications.

Despite its many strengths, the evidence in Part II demonstrates that the SSCSB's engagement with non-government participants, and in particular with the broader community and the media, is limited compared to the other committees studied. Chapter 5 also documented the challenges the SSCSB faces when it comes to tabling its final reports prior to the resumption of the second reading debate on a Bill, particularly when responses from Ministers are delayed or inadequate. In light of these comparative 'weaknesses', it is tempting to recommend a raft of changes that reframe the 'technical' character of the SSCSB and bring it closer to that of the PJCIS or LCA Committees. However, as the earlier discussion in this chapter warns, making such changes to the SSCSB could jeopardise the precise features of the committee that give it its comparative strengths as a 'non-political', 'technical' committee.

For this reason, my recommendations stop short of calling for the SSCSB to hold more public inquiries into Bills, or encouraging the committee to publicise its findings in media releases. Instead, my recommendations focus on increasing the SSCSB's opportunities to interact meaningfully with other parliamentary committees, as well as identifying new opportunities for the SSCSB to improve its engagement with the broader community. For example, I recommend that the SSCSB actively seek public feedback on existing and proposed Guidance Notes or other statements that seek to flesh out aspects of its scrutiny criteria in more detail. This could be easily managed by the committee without disturbing its 'technical' character, for example by drawing upon its already strong relationships with the legal profession and public servants. It could also allow the SSCSB to engage with other community groups without holding public hearings or impinging on tight time frames for completing scrutiny reports.

The publication of more targeted Guidance Notes would also provide a practical opportunity for the SSCSB to liaise with the PJCHR. For example, the two committees (which are already supported by a combined secretariat structure that also includes the Senate Standing Committee

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<sup>22</sup> Senate *Standing Order* 25.2A (15 July 2014) for legislative and general purpose committees includes a requirement to take into account any SSCSB or SCSRO reports.

on Regulations and Ordinances)<sup>23</sup> could develop joint Guidance Notes on rights issues of common concern, such as those listed in Appendix E. Such joint Guidance Notes could explicitly identify how each particular committee approaches the rights issue, or evaluates the appropriateness of safeguards or limitations on rights, whilst at the same time demonstrating the commonality in analytical approaches between the two committees. This in turn would help improve the relevance of these materials for a wide range of key participants, particularly for public servants and parliamentary counsel who rely upon consistency and clarity when it comes to providing advice on the rights-compliance of legislative options for government.

My recommendations also share features with those made by the 2012 SSCSB report on the future directions of the SSCSB.<sup>24</sup> For example, both the future directions report and this thesis recommend that the committee:

- consider and publish its scrutiny reports during non-sitting periods in appropriate cases;
- notify the Senate of any instance of a Minister's failure to respond to a request for information from the SSCSB (after a reasonable time and with notice to the Minister);
- include a link from the Parliament's homepage for a Bill to any relevant Alert Digest *or* report which comments on that Bill; and
- establish an internal database to capture the committee's comments on Bills from 2000 onwards.<sup>25</sup>

From the interview material obtained for this thesis, it appears that moves are already underway to implement some of these strategies in practice. For example, an interviewee said that the committee has been:

producing a quarterly responsiveness table, which provides the opportunity to [identify] people for a lack of response. [The previous committee] put in a notice of motion for a

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<sup>23</sup> Discussed further below, see also Interview with B (Canberra, 23 May 2016).

<sup>24</sup> SSCSB, Parliament of Australia, *Inquiry into the future direction and role of the Scrutiny of Bills Committee* (2012).

<sup>25</sup> Ibid [7.16]–[7.22].



temporary order where any senator could take note of a lack of response before debate. ... [I]t will be up to the next committee whether it proceeds with that.<sup>26</sup>

As noted in Chapter 3, since November 2017 this has been reflected in Standing Order 24 which provides that the SSCSB shall ‘maintain on its website a list of bills in relation to which the committee has sought advice from the responsible minister and not yet received a response’.<sup>27</sup> The amended Standing Order also provides that, where the SSCSB has not been able to complete a final report on the Bill because a ministerial response has not been received, then ‘any senator may ask the minister for an explanation of why the minister has not provided a response to the committee’.<sup>28</sup> This can be followed by a motion without notice asking that the ‘Senate take note of the explanation’ or that the Senate note the Minister’s ‘failure to provide an explanation’.<sup>29</sup> Similar strategies are also recommended with respect to the PJCHR and are discussed below.

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<sup>26</sup> Interviews with A and B (Canberra, 23 May 2016).

<sup>27</sup> Senate, Parliament of Australia, *Standing Order* 24(1)(d) (17 November 2017).

<sup>28</sup> Senate, Parliament of Australia, *Standing Order* 24(1)(e) (17 November 2017).

<sup>29</sup> Senate, Parliament of Australia, *Standing Order* 24(1)(f)–(g) (17 November 2017).

**Table 10.4: Reform Options for the PJCHR**

| Aim   | Recommendation  | Implementation                 |
|---|---|--------------------------------|
| <b>Enhance relevance and accessibility of analysis</b>                  | Use reports to highlight rights- <i>protecting</i> as well as rights-infringing qualities of proposed laws.   | Committee Chair, secretariat   |
|   | Continue to explicitly acknowledge instances where international human rights law concepts overlap with or intersect with SSCSB criteria, common law principles or other established principles of Australian law.  | Committee Chair, secretariat   |
|   | Build capacity within the committee's membership to articulate and apply a consistent approach to 'balancing' rights and public interests. This could be assisted by the publication of more Guidance Notes (see below).  | Committee Chair, secretariat   |
|   | Publicly acknowledge high-quality SoCs including through the Chair's Tabling Statement, the annual report and by informal means such as posting on PJCHR's website  | Committee members, secretariat |
|   | Compile a database of PJCHR reports and SoCs that can be searched thematically and/or by 'rights issue'.  | secretariat                    |
|   | Prioritise the development of rights-specific Guidance Notes that focus on rights issues commonly emerging from the committee's work, and include specific examples of the types of safeguards necessary if the Parliament intends to permissibly limit a protected right. These Guidance Notes should be developed in close consultation with the SSCSB, OIL, other relevant departments and parliamentary counsel. Public input should also be sought, for example, by requesting comments on draft Guidance Notes. | Committee Chair, secretariat   |
|   | Liaise with parliamentary counsel to distil commonly applied human rights principles into a drafting check list that can be readily incorporated in Drafting Directions and the <i>Legislation Handbook</i> .   | Secretariat                    |
|   | Prepare and table regular annual reports that document the impact of the PJCHR on the content and development of proposed laws.   | Committee Chair, secretariat   |
| <b>Improve timeliness of reporting, including through Alert Digests</b> | Adopt Alert Digest style reporting practices to ensure that the PJCHR's initial views on human rights compatibility are available prior to the resumption of the second reading debate on a Bill. These Alert Digests could be drafted in a similar style and structure to the SSCSB's Alert Digests, leaving the more detailed analysis and response from the proponent Minister to be discussed in the subsequent final report  | Committee Chair, secretariat   |
|   | 'Name and shame' delayed responses from proponent Ministers to reasonable requests for information by the committee, for example by publicising late responses to requests for information and demanding an explanation from the proponent Minister in Parliament, in line with recently amended Standing Order 24(1)(d)–(g).   | Committee Chair                |
| <b>Encourage collaboration with other committees</b>                    | Liaise regularly with the Chair and secretariat staff of the SSCSB with the view to preparing joint Guidance Notes on areas of common concern, such as retrospectivity, access to judicial review, and procedural fairness guarantees.  | Committee Chair, secretariat   |
|   | Amend Senate Standing Order 25.2A to require inquiry-based committees to have regard to reports of the PJCHR as well as the SSCSB.  | Parliament                     |
|   | Liaise with the inquiry-based committees to identify what resources and reports prepared by the PJCHR are most useful to these committees when undertaking inquiries into rights-engaging Bills. Prioritise the development of Guidance Notes that address the needs of the inquiry-based committees for reliable, 'technical' analysis of common rights concerns.  | Committee Chair, secretariat   |

## D PJCHR

As observed in Part II and Chapter 8, of all the committees studied in this thesis, the PJCHR struggled to demonstrate high impact on the case study Acts. The relatively short lifespan of the committee,<sup>30</sup> coupled with its complex mandate, contribute to its comparatively lower status among key participants, and its relative lack of direct legislative and public impact. This is further exacerbated by the confusion that appears to exist about the true goal or purpose of the committee. As discussed in Chapter 3 and highlighted in the interview material included in Part II, for many key participants it is either not clear exactly what the PJCHR's goal is, or whether the PJCHR is capable of living up to the high expectations held at the time of its establishment.<sup>31</sup> Is it a technical scrutiny committee, or a committee designed to actively promote human rights compliance? Is the committee comfortable working largely on the papers, or should it facilitate human rights discussions among the broader Australian community? These are some of the persistent questions that have plagued the PJCHR's early history. They lead, in turn, to more practical questions relating to timing of tabling of reports, how dissenting views should be dealt with, and the content and quality of SoCs.

This thesis argues that, by focusing on the PJCHR's emerging strengths, and its potential capacity to collaborate with other parliamentary committees in the system, it is possible to

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<sup>30</sup> The fact that the PJCHR has only been in operation since 2012 was noted in the following interviews: Interview with B (Canberra, 23 May 2016); Interview with Aruna Sathanpally, Legal Advisor, Parliamentary Joint Committee on Human Rights (telephone, 23 June 2016); Interview with Simon Rice, former Legal Advisor to the Parliamentary Joint Committee on Human Rights (Sydney, 24 May 2016); Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

<sup>31</sup> See, eg, George Williams and Lisa Burton, 'Australia's Parliamentary Scrutiny Act: An Exclusive Parliamentary Model of Rights Protection' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 257; George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2016) 41(2) *Monash University Law Review* 469; Rosalind Dixon, 'A New (Inter)national Human Rights Experiment for Australia' (2012) 23(2) *Public Law Review* 75; Dan Meagher, 'The Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) and the Courts' (2014) 42 *Federal Law Review* 1; Shawn Rajanayagam, 'Does Parliament Do Enough? Evaluating Statements of Compatibility under the Human Rights (Parliamentary Scrutiny) Act' (2015) 38(3) *University of New South Wales Law Journal* 1046; James Stellios and Michael Palfrey, 'A New Federal Scheme for the Protection of Human Rights' (2012) 69 *AIAL Forum* 13; Edward Santow, 'The Act that Dares Not Speak its Name: the National Human Rights Consultation Report's Parallel Roads to Human Rights Reform' (2010) 33(1) *University of New South Wales Law Journal* 8. Alexander Williams and George Williams, 'The British Bill of Rights Debate: Lessons from Australia' (2016) *Public Law* 471; Daniel Reynolds and George Williams, *A Charter of Rights for Australia* (NewSouth Books, 4th ed 2017); George Williams, 'Scrutiny of Primary Legislation Principles and Challenges: Where are We Now and Where are We Headed?' *Australia-New Zealand Scrutiny of Legislation Conference*, Parliament House, Perth, 12 July 2016.

resolve at least some of the existential questions confronting the PJCHR, and to improve its rights-enhancing impact.

As Part II documented, the PJCHR's emerging strengths centre on the following practices and outputs:

- the provision of high-quality and detailed rights analysis that often involves reference to comparative international sources, common law rights, High Court decisions and findings by other oversight bodies such as the AHRC and the INSLM. The evidence in Part II suggests that it is increasingly relied upon and referred to by other parliamentary committees and in submissions to inquiry-based committees;
- the high degree of cross-over between the findings of the PJCHR on a narrow range of 'legal process' related rights and the recommendations made by inquiry-based committees, which are regularly reflected in successful amendments to proposed laws;
- the articulation and application of the 'proportionality test'<sup>32</sup> as a framework for balancing competing rights and interests arising from a particular law; and
- a small but growing awareness of the value of the analysis provided by the PJCHR by a handful of parliamentarians, and among some government departments, particularly the AGD.

These strengths suggest that the PJCHR is performing relatively well as a 'technical scrutiny' committee, at least for a committee of its age. These are also the features of the PJCHR that appear to attract the most legitimacy among the broadest range of key participants,<sup>33</sup> suggesting that investing in the PJCHR's technical scrutiny role may also help to improve the committee's political authority.

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<sup>32</sup> For an overview of the 'proportionality test' as applied by the PJCHR see, eg, PJCHR, Parliament of Australia, *Guidance Note 1: Drafting Statements of Compatibility* (2014) <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)>. For further discussion see Michael Newton and Larry May, *Proportionality in International Law* (Oxford University Press, 2014). Cf Shipra Chordia, 'The problem of balancing: structured proportionality and tiered scrutiny', Harvard Law School Visiting Scholar Colloquium Series, Harvard Law School, Cambridge, 30 November 2016.

<sup>33</sup> For further discussion see Chapters 4 and 7.

One way to invest in the PJCHR's technical scrutiny function is to ensure that the committee's reports are targeted to those responsible for developing and drafting proposed legislation. For example, I recommend that the PJCHR allocate time and resources to the preparation of Guidance Notes that focus on commonly arising rights issues, and specifically identify examples of the types of safeguards that should be included in proposed provisions that seek to interfere with or limit a protected right. This would serve the dual purpose of (1) clearly acknowledging that it may be permissible for the executive to limit a right, provided certain criteria are met; and (2) providing clear, prospective guidance to policy makers and parliamentary counsel about the types of provisions and safeguards that would be considered rights compliant by the PJCHR.

These types of more targeted Guidance Notes could be developed in active consultation with key submission makers, the SSCSB and the inquiry-based committees. Indeed, this type of successful public engagement occurred at the beginning of the PJCHR's life, when the processes and practices of the committee were still being finalised.<sup>34</sup> The PJCHR has also been proactive in providing its own submissions to the inquiry-based committees on occasion, and this practice could be further supported and encouraged as a way of adding value to the multi-committee scrutiny process.<sup>35</sup>

The utility of the reports prepared by the PJCHR could be further enhanced by making it easier to access and understand the PJCHR's views on particular rights issues over time. While efforts are currently made in the PJCHR's annual report to list those rights most commonly considered by the committee,<sup>36</sup> it remains a slow and cumbersome task to distil the key principles applied by the committee on commonly considered rights such as the right to a fair trial. This could be addressed by compiling a database of PJCHR reports that could be searched thematically or by 'key word' to enable submission makers, parliamentary committee staff, parliamentary counsel and others to quickly access what the PJCHR has said on a particular rights issue across a range of different Bills. This would in turn improve the likelihood that submission makers to inquiry-

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<sup>34</sup> Interview with Penny Wright, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee, former Australian Greens Senator for South Australia (Adelaide, 11 August 2016).

<sup>35</sup> PJCHR, Parliament of Australia, *Annual Report 2012–13* (2013) [1.34]–[1.35].

<sup>36</sup> *Ibid* app 6.

based committees, and parliamentarians themselves, would draw upon the work of the PJCHR in their public advocacy on particular rights issues or Bills.

My research suggests that the PJCHR could also improve its legitimacy among public servants and government parliamentarians by regularly and publicly acknowledging positive efforts by the executive to have regard to the rights implications of proposed laws at an early stage. This could include, for example, publishing examples of high-quality SoCs on the PJCHR website. It could also involve the PJCHR explicitly recognising that, very often, the policy driver behind proposed laws is at least in part rights promoting, even if the provisions of the proposed law are not rights compliant. Like the former INSLM Bret Walker SC, I recommend that these rights-promoting aims be consistently and explicitly acknowledged in PJCHR reports,<sup>37</sup> before descending into a more critical analysis of the overall rights compliance of the Bill.

Of course, these recommended changes depend upon key participants receiving the reports of the PJCHR in adequate time to make use of their contents before the passage of the particular Bill. To this end, this thesis draws upon recommendations made by other scholars designed to improve the timeliness of the tabling of PJCHR reports. For example, I support the recommendation made by Williams and Burton that a ‘guaranteed minimum time period’ be provided between the introduction of a Bill and the completion of the second reading debate on the Bill to ensure that the PJCHR can consider and report on any proposed Bill.<sup>38</sup> This could be achieved by the adoption of a Standing Order, applicable in both Houses, that provides that, as a general rule, the second reading debate on a Bill should not resume until the reports of all relevant committees have been tabled.<sup>39</sup>

However, in recognition that such a reform would demand strong executive leadership and majority parliamentary support across both Houses, I also recommend reforms that can be implemented by the PJCHR itself. Chief among these is the recommendation that the PJCHR

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<sup>37</sup> See, eg, Interview with Bret Walker SC, former Inspector General of Intelligence and Security (Sydney, 30 May 2016).

<sup>38</sup> Williams and Reynolds, above n 31, 479.

<sup>39</sup> Ibid 502. See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 127 (Interim) (2015) 52. This recommendation is included in the system-wide recommendations set out in Chapter 9.

adopt the Alert Digest style<sup>40</sup> reporting practices of the SSCSB to ensure its initial views on the human rights compatibility of a Bill are available *prior* to the resumption of the second reading debate. These Alert Digests could be drafted in a similar style and structure to the SSCSB's Alert Digests (more recently known as Initial Scrutiny Reports), leaving the more detailed analysis and response from the proponent Minister to be discussed in subsequent final reports (more recently known as 'Commentary on Ministerial Responses').

Recent experience suggests that the PJCHR is already experimenting with tabling multiple reports on particularly complex or rights-engaging Bills<sup>41</sup> and issuing scrutiny reports which include consideration of 'matters where a response is required' as well as 'concluded matters'.<sup>42</sup> This appears to be supported by the recent practice of sharing secretariat staff between the SSCSB and the PJCHR. This type of initial scrutiny reporting allows the PJCHR's preliminary views to be made available to Parliament prior to the completion of the second reading debate on the Bill, while their concluded views are presented some time later, following the receipt of a response from the relevant Minister. My recommendation to adopt a more consistent Alert Digest or Initial Scrutiny approach would formalise this process, without undermining the PJCHR's commitment to engaging in a meaningful 'dialogue' with the executive about the rights compliance of proposed laws.<sup>43</sup>

The interview material gathered for this thesis suggests that the use of Alert Digest and Bill-specific reporting would also greatly improve the chances of the views of the PJCHR being considered by a wide range of key participants prior to decisions being made on the content

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<sup>40</sup> As noted in Chapter 3, since 2017, the SSCSB began publishing its scrutiny comments on recently introduced Bills (including responses received on matters previously considered by the committee) in one report, the *Scrutiny Digest*. However, the *Scrutiny Digest* continues to be divided into initial reports on the Bill (previously called 'Alert Digests', now called 'Initial Scrutiny') and concluded reports on the Bill (previously called 'Reports' now called 'Commentary on Ministerial Responses'). See, eg, SSCSB, Parliament of Australia, *Scrutiny Digest No 7 of 2017* (21 June 2017). Similar language could be adopted by the PJCHR.

<sup>41</sup> See, eg, PJCHR, Parliament of Australia, *Twenty-Fifth Report of the 44th Parliament* (2015) 23; PJCHR, Parliament of Australia, *Thirty-Sixth Report of the 44th Parliament* (2016) ch 2 'Concluded Matters'. See also PJCHR, Parliament of Australia, *Seventh Report of 2016* (2016); PJCHR, Parliament of Australia, *Eighth Report of 2016* (2016).

<sup>42</sup> See, eg, PJCHR, Parliament of Australia, *Report No 6 of 2017* (2017).

<sup>43</sup> The commitment of committee Chairs, members and staff to the preservation of this dialogue – which hinges on the proponent Minister having the opportunity to provide further written information to the PJCHR – appears to have thwarted efforts to ensure speedy tabling of PJCHR reports in the past. See, eg, Interview with B (Canberra, 23 May 2016); Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

and merits of the Bill.<sup>44</sup> Alert Digest style reports could be supported by the development of Guidance Notes on commonly occurring rights issues, as discussed above, and by the establishment of a searchable database of PJCHR comments, to enable public servants who are involved in the legislation development process to quickly and easily access past PJCHR comments on relevant provisions or rights issues.

Alert Digest style reporting could also assist the PJCHR to ‘develop a procedure for progressing to a conclusion when a response [from a proponent minister] is not forthcoming’, as recommended by Williams and Reynolds,<sup>45</sup> and help to diffuse the tensions surrounding the handling of dissent within the PJCHR. For example, it would enable the committee to express preliminary rights compatibility concerns in the form of questions, or ‘leaving matters to the Parliament as a whole to consider’, in the style of the SSCSB, rather than requiring PJCHR members to directly criticise an aspect of government policy on human rights grounds.

Alert Digest style reporting by the PJCHR could also help the committee experiment with new ways to present dissenting views on rights compatibility in its reports. For example, the PJCHR could follow a practice of raising rights compatibility questions at the Alert Digest stage, along with information about how such questions are resolved under international human rights law. This would allow the rights issue to be brought to the early attention of the Parliament and could provide a useful analytical framework to inform the public debate on the rights question. If dissenting views are still held within the committee they could be set out at the final report stage in a similar style to the ‘dissenting comments’ or ‘additional comments’ frequently included in the LCA Committees’ reports.<sup>46</sup>

Alert Digest style reporting would also provide a strong basis for the PJCHR to adopt the type of strategies currently being implemented by the SSCSB to address the lack of timely response by Ministers to requests for further information and demand that Ministers be held to account

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<sup>44</sup> See discussion in Chapter 7 and Interview with Penny Wright, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee, former Australian Greens Senator for South Australia (Adelaide, 11 August 2016); Interview with Official A, Attorney-General’s Department (Canberra, 23 May 2016).

<sup>45</sup> Williams and Reynolds, above n 31, 479.

<sup>46</sup> This recommendation can be compared with that of Williams and Reynolds, who take the view that ‘The current approach of the PJCHR ... allows dissent to be anonymous, unsubstantiated and unresolved’ and suggest that ‘[a]n appropriate solution to this would be to amend the Act so that it requires the Committee to reach a majority view, while making provision for dissenting members to provide reasons, along with their names’. Ibid, 503.



for their failure to respond through a motion in Parliament. For example, like the SSCSB, the PJCHR could take steps to publicise instances of delayed responses from proponent Ministers to reasonable requests for information.<sup>47</sup>

Should the recommendations above relating to Alert Digest style reporting be adopted by the PJCHR, similar procedural consequences could follow. For example, a Bill could be barred from the ‘non-controversial’ list if it receives criticism from the PJCHR in its initial scrutiny report on the Bill. While most Bills dealing with national security or counter-terrorism would automatically be categorised as ‘controversial’, this procedural change could provide an additional incentive for proponent Ministers to take the initial scrutiny findings of the PJCHR seriously and implement practices for responding to PJCHR requests for information in a timely way.

Taken together, these recommendations are designed to improve the utility and effectiveness of the PJCHR as a ‘technical scrutiny’ body, rather than an inquiry-based committee, on the basis that this is the best way for the committee to improve its rights-enhancing impact within the broader committee system. While at first blush it may be tempting to recommend more radical reforms, the evidence gathered in Part II warns against this approach. For example, the evidence presented in Chapters 4 and 7 suggests encouraging the PJCHR to conduct more public hearings and more proactively publicise its findings of non-compliance could put the legitimacy of the PJCHR at risk. By more proactively entering the public debate on a Bill, the PJCHR could be *more* susceptible to perceptions of illegitimately engaging in policy evaluation, at greater risk of alienating parliamentarians and submission makers, and face larger challenges when it comes to dealing with dissent.<sup>48</sup> The findings and conclusions of the

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<sup>47</sup> As noted above, on 17 November 2017 Standing Order 24 was amended to provide, where the SSCSB has not been able to complete a final report on the Bill because a ministerial response has not been received, then ‘any senator may ask the minister for an explanation of why the minister has not provided a response to the committee’. This can be followed by a motion without notice asking that the ‘Senate take note of the explanation’ or that the Senate note the minister’s ‘failure to provide an explanation’. Senate, Parliament of Australia, *Standing Order* 24(1)(d)–(g) (17 November 2017).

<sup>48</sup> Indeed some of these criticisms were levelled at the PJCHR after the committee’s 2016–17 Inquiry into Freedom of Speech. See, eg, Rob Inglis, ‘Parliamentary Joint Committee on Human Rights releases freedom of speech report’, *The Examiner* (Hobart), 28 February 2017 <<http://www.examiner.com.au/story/4498392/free-speech-report-tabled/>>; see also David Crowe, ‘Malcolm Turnbull Urged to Overhaul HRC as Review Splits on 18C’, *The Australian* (online), 28 February 2017 <<http://www.theaustralian.com.au/national-affairs/malcolm-turnbull-urged-to-overhaul-hrc-as-review-recommends-no-changes-to-18c/news-story/e8fbbcd2f0163f4a3dfbc7cd6770066d>>.

PJCHR may also be harder to predict, putting at risk its emerging hidden impact among public servants and parliamentary counsel who rely upon consistency and clarity when it comes to articulating and applying human rights principles.

My recommendations are also consistent with the views of a number of key participants interviewed, including former Chair of the PJCHR Senator Smith, who rejected the idea of increasing the deliberative role of the PJCHR when it comes to Bills scrutiny, on the basis that it would undermine the ‘technical’ scrutiny role of the committee and bring it into conflict with the Parliament’s role as the final adjudicator on rights issues. Senator Smith said:

there should not be a deliberative role for committees with a scrutiny function. The scrutiny undertaken by the committee is expert based, prepared with the assistance of an expert legal advisor. The onus is on the government to demonstrate compliance with the human rights standards. The debate on balancing human rights and the public interests is up to Parliament.<sup>49</sup>

By focusing on the PJCHR’s technical scrutiny role, my recommendations also acknowledge what Stephenson describes as Australia’s system of multi-stage rights review,<sup>50</sup> and seek to maximise the PJCHR’s ability to contribute positively to resolving institutional disagreements on rights, rather than exacerbating those disagreements by investing the committee with a more proactive rights-adjudicating role.

### E *Summary of Committee-Specific Reforms*

The recommendations discussed above descend into the practical detail necessary to ensure that the individual committees studied capitalise on their particular strengths as identified in Part II of my research. They aim to equip each committee with new tools and strategies to ensure that their already rights-enhancing work is seen and relied upon by key decision makers in the system. They also provide opportunities and incentives for individual committees to work collaboratively and include a strong focus on responding to the needs of public servants

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<sup>49</sup> Interview with Dean Smith, Liberal Senator for Western Australia, former Chair of the Parliamentary Joint Committee on Human Rights (telephone, 22 September 2016).

<sup>50</sup> Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 8.

and sophisticated submission makers, who are at the front line when it comes to influencing the content of rights-engaging laws and policies.

My recommendations also resist the temptation to look to one particular committee to carry the lion's share of rights-scrutiny work, or to create a 'super committee' with extensive powers and wide-ranging functions. Instead, the reforms I advocate listen to the views obtained from those working closely in the committee system and reflect on the features of Australia's multi-stage approach to rights review discussed in Part I of this research. For this reason, my recommendations allow each individual committee to continue to performance the role that attracts the most legitimacy in the eyes of key participants, whilst ensuring that other committees in the system have the capacity to perform some of the functions necessary for meaningful rights protection. In this way, the recommendations in this chapter reflect the broader theme of this research by encouraging investment in the way committees work together as a system. In this way, my work offers a new standpoint from which to view Australia's parliamentary model of rights protection, discussed further in the final chapter below.

## CHAPTER 11: CONCLUSION

This thesis has explored the role and function of parliamentary committees and how they contribute to rights protection at the federal level through the lens of 12 counter-terrorism case study Acts. Part II of this thesis collated evidence of three tiers of impact (legislative, public and hidden) attributable to the work of the four parliamentary committees, elucidating with new clarity the rights-enhancing role parliamentary committees can play. The material in Part II also highlighted that different parliamentary committees have different strengths and weaknesses and therefore have an impact on proposed laws in different ways. Part II revealed that it is when different committees work together to scrutinise a law that the biggest rights impact is felt. These findings provide the basis for the recommendations in the previous two chapters, which are designed to lay out a new, practical pathway for improving the contribution parliamentary committees can make to rights protection in Australia.

In this concluding chapter, I reflect on the central theme of this thesis, and argue that understanding parliamentary committees working together as a *system* provides the most fertile opportunity to identify options to improve Australia's parliamentary model of rights protection. I also argue that the findings made in Part II and the recommendations made in Part III are of particular relevance to rights advocates as they provide a persuasive counterpoint to those who have expressed scepticism about the capacity of the parliamentary committee system to deliver meaningful rights protection. In this way, my research brings a new perspective to the broader discussion on how rights should be protected in Australia, which is considered in further detail below.

### *A Understanding Parliamentary Committees as a System is the Key to Improving their Rights-Protecting Capacity*

Many of the rights advocates discussed in Chapter 1, including Evans and Evans,<sup>1</sup> Williams<sup>2</sup>

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<sup>1</sup> See, eg, Simon Evans and Carolyn Evans, 'Australian Parliaments and the Protection of Human Rights' (Paper presented in the Department of the Senate Occasional Lecture Series at Parliament House, Canberra, 8 December 2006).

<sup>2</sup> See, eg, George Williams and Lisa Burton, 'Australia's Exclusive Parliamentary Model of Rights Protection' (2013) 34 *Statute Law Review* 58.

and Charlesworth,<sup>3</sup> have argued that the parliamentary model of rights protection operating at the federal level is fundamentally flawed and that significant structural change is needed to ensure meaningful and comprehensive protection of rights in Australia. They have pointed out, for example, that the rights of minorities can often be overlooked or overridden in a system that leaves open multiple opportunities for executive dominance and populist policy making.<sup>4</sup> Some have cited rights-abrogating features of Australia's counter-terrorism laws as examples of the failure of the parliamentary model of rights protection to guard against unjustified intrusion into individual rights.<sup>5</sup> While initially hopeful that the establishment of the PJCHR would help to 'fill the gaps' in rights protection at the federal level, many have since lamented the inability of the PJCHR to have a strong rights-protecting impact on legislation.<sup>6</sup> They have largely dismissed the capacity of the parliamentary committee system to offer meaningful rights protection, at least without the support of a greater oversight role for the courts.

As noted in Chapter 1, prior to commencing my research I shared the views expressed above; however, the substantial list of rights-enhancing changes attributable to the work of parliamentary committees uncovered in Part II persuaded me to reassess my previous scepticism.<sup>7</sup> It also led me to engage in a different way with the arguments of those who had previously sought to evaluate the role of parliamentary committees in rights protection.<sup>8</sup>

As I conducted my research, it became clear that previous analysis of the role of parliamentary committees in rights protection in Australia and elsewhere had been focused on individual

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<sup>3</sup> See, eg, Hilary Charlesworth, *Writing in rights: Australia and the protection of human rights* (UNSW Press, 2002); Hilary Charlesworth, 'Who Wins Under a Bill of Rights?' (2006) 25 *University of Queensland Law Journal* 39.

<sup>4</sup> Ibid; Williams and Burton, above n 2.

<sup>5</sup> See, eg, Greg Carne, 'Re-Orientating Human Rights Meanings and Understandings? Reviving and Revisiting Australian Human Rights Exceptionalism Through a Liberal Democratic Rights Agenda' (2015) 17 *Flinders Law Journal* 61.

<sup>6</sup> See, eg, Williams and Burton, above n 2.

<sup>7</sup> See discussion in Chapter 1, Sections C and D. See also discussion in Chapters 4–7 and Appendices E and D.

<sup>8</sup> See discussion in Chapter 1, Sections C and D. Some of the past evaluations of parliamentary committees considered in detail include: Williams and Burton, above n 2; Evans and Evans, above n 1; Tom Campbell and Stephen Morris, 'Human Rights for Democracies: a Provisional Assessment of the Australian Human Rights (Parliamentary Scrutiny) Act 2011' (2015) 34(1) *University of Queensland Law Journal* 7; Dominique Dalla-Pozza, 'The Conscience of Democracy? The Role of Australian Parliamentary Committees in Enacting Counter-Terrorism Laws' (Paper presented at the Australasian Law and Society Conference, Wollongong, December 2006) <[www.aspg.org.au/conferences/adelaide2007/Dalla-pozzo.pdf](http://www.aspg.org.au/conferences/adelaide2007/Dalla-pozzo.pdf)>.

committees achieving (or struggling to achieve) their prescribed scrutiny mandates. It had not included a sustained focus on how different committees in a parliamentary system work together, the impact such a system might have on the behind-the-scenes development of legislation, or how such a system of committees might work to generate its own dynamic rights-scrutiny culture. Past analysis of the PJCHR, for example, concludes that it has had only minimal impact on the content or development of federal laws since 2012,<sup>9</sup> but does not consider in detail the extent to which the work of the PJCHR has contributed to the impact other committees in the system are having on our laws and parliamentary processes. Similarly, past studies of other parliamentary committees in Australia have not included a focus on how the inquiry-based committees, such as the PJCIS, may be influencing the post-introduction development of federal laws.<sup>10</sup> This leaves open the possibility that past analysis of Australia's parliamentary model of rights protection has underestimated the contribution made by parliamentary committees working as a *system*, and the potential for this system to be improved.

By focusing on how parliamentary committees work together, my research uncovers new opportunities for improving the rights-enhancing role of parliamentary committees that build upon the particular strengths and weaknesses of particular committees and encourage system-level collaboration and coordination. My research suggests that relatively minor changes could be made to the practices and processes of individual committees, which would allow them to maximise their rights-enhancing contribution to the committee system, without changing their character or diluting the respect they enjoy in the eyes of key participants. For example, my recommendations strengthen the capacity of the inquiry-based committees to attract a broader and more diverse range of submission makers and introduce practical strategies to improve the experience for first-time inquiry witnesses. My recommendations also encourage the scrutiny committees to prioritise the development of the type of materials and publications that the other key participants in the committee system find most useful.

My recommendations also seek to address a number of structural and resource-related shortcomings within the committee system that may present barriers to individual committees

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<sup>9</sup> See, eg, Williams and Burton, above n 2.

<sup>10</sup> See, eg, Evans and Evans, above n 1.

working more effectively with other committees in the system. For example, my recommendations encourage the expanded use of transparent secondee arrangements to support the high performing but under-resourced pool of secretariat staff that support parliamentary committees. I also recommend changes to the Standing Orders to set out clear expectations around response times to committee requests for information, and for the timely tabling of committee reports. Specific changes are also recommended to the tabling of PJCHR reports – centred around the adoption of Alert Digest style reporting – to give key participants greater opportunity to access and understand the PJCHR’s rights analysis prior to making decisions about the merits of a proposed Bill. These changes are designed to be implemented primarily by public servants, parliamentary committee staff and committee Chairs and are generally not dependent on legislative change. It is hoped, therefore, that they could be adopted swiftly, and their veracity quickly tested by monitoring whether the rights-enhancing impact of the individual committees studied – and the system more broadly – improves.

My research also highlights the value in understanding and investing in the rights-scrutiny culture that currently exists among the system of committees at the federal level, rather than relying upon one particular committee to hold the executive to account for its compliance with human rights obligations. While this may initially sound like a ‘weak’ approach to rights protection or an uncritical endorsement of the status quo, my research suggests that investing in the existing committee system has a number of advantages over other more radical models of rights reform.

These advantages derive from the fact that the parliamentary committee system emulates and reinforces the existing institutional culture of the Australian Parliament described in Chapter 3, including the way institutions of government instinctively seek to resolve disagreements on rights. As Stephenson explains, this institutional culture can have a particularly powerful behind-the-scenes impact and is difficult to shift, even when structural reforms are implemented that seek to give explicit rights-protecting roles to other branches of government.<sup>11</sup> Stephenson’s work suggests that building upon the parliamentary committee system as a way to improve rights protection at the federal level may be an easier cultural fit – and therefore more readily accepted and more likely to be sustainable – than adopting more

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<sup>11</sup> Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 8, 211.

radical structural change, such as the introduction of a constitutionally entrenched bill of rights, that would significantly alter the way federal institutions ‘disagree’ with each other on rights. This is supported by the contextual material presented in Chapter 3, which demonstrates that the non-rights-protecting roles parliamentary committees play (such as providing the opportunity for parliamentarians to build their public profile and influence policy development, make connections with sophisticated submission makers and generate media interest) encourage a broad range of parliamentarians to be involved in committee processes. This in turn provides a broad and powerful base of parliamentarians who can then potentially go on to utilise this committee system to protect and promote the rights they consider to be important and shared by the Australian community, such as those principles set out in Appendix E.

Human rights advocates such as Carne may be correct to point out the shortcomings in any attempt to articulate a list of commonly acknowledged individual rights from a parliamentary setting, warning that such lists rarely cover the full range of internationally protected rights and risks ignoring rights of unpopular or politically isolated minorities.<sup>12</sup> However, my research (particularly Chapter 5 documenting legislative impact) suggests that the emerging rights-scrutiny culture within the federal Parliament may be more robust than first imagined, at least in the context of the case study Acts, and could be the key to improving the capacity of Australia’s parliamentary model of rights protection. For this reason, I recommend changes to the parliamentary committee system that seek to legitimise and acknowledge all meaningful efforts to undertake rights scrutiny, regardless of the language used or the scope of the rights criteria applied. The recommendations I propose seek to do this by supporting *both* the SSCSB and the PJCHR to continue to produce timely and accessible analysis of Bills using their own separate ‘rights criteria’, whilst at the same time looking for opportunities for the two committees to collaborate where appropriate. This approach aims to welcome rights advocates from all political persuasions by emphasising the shared and dynamic nature of the emerging rights-scrutiny culture at the federal level, rather than alienating those parliamentarians who may be reluctant to embrace international human rights law, either due to lack of knowledge or political positioning. This recommendation feeds into and is supported by my broader

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<sup>12</sup> Carne, above n 5; Charlesworth, *Writing in rights*, above n 4; Charlesworth, ‘Who Wins Under a Bill of Rights?’, above n 4. For more recent discussion of some of these issues see George Williams, ‘Scrutiny of Primary Legislation Principles and Challenges: Where are We Now and Where are We Headed?’ *Australia-New Zealand Scrutiny of Legislation Conference*, Parliament House, Perth, 12 July 2016.



recommendation to undertake further research to test and document the emerging rights-scrutiny culture identified in this case study in other areas of law. These considerations also inform the new perspective I now bring to bear on Australia's model of rights protection and the ways it can be improved in the future.

### B *New Perspectives on Australia's Parliamentary Model of Rights Protection*

By focusing on parliamentary committees working together as a system, my research offers important new perspectives on the work of other rights advocates who have considered the role parliamentary committees play (or could play) in Australia's parliamentary model of rights protection. For example, my findings help provide a broader context in which to assess the performance of the PJCHR, building upon the qualitative work undertaken by Campbell and Morris, and Williams, Reynolds and Burton, and offering alternative options for enhancing the PJCHR's capacity to contribute to Australia's parliamentary model of rights protection.<sup>13</sup> While my research confirms many of the findings of these scholars on the PJCHR's limited legislative and public impact, I argue that the high-quality rights analysis provided by the PJCHR is making an important contribution to the rights-enhancing work of other committees and their submission makers. Moreover, I argue that this analysis is the source of the PJCHR's current and future legitimacy among key participants, and that this more 'technical scrutiny' role should be the future focus of the committee. For this reason, I recommend strategies to maximise the quality, timeliness and accessibility of the rights-scrutiny analysis of proposed laws, but warn against changing the character of the committee to resemble that of the inquiry-based committees.

My findings also build upon and update the 2006 evaluation of rights protection in the Australian Parliament undertaken by Evans and Evans, by highlighting a broader spectrum of rights-enhancing impacts made by the parliamentary committee system during the period 2001–15.<sup>14</sup> The emergence of the PJCIS as a committee with a strong legislative impact, and the considerable behind-the-scenes influence of the SSCSB revealed in my research, challenge the conclusion reached by these scholars during their 2006 study that the rights protection

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<sup>13</sup> Williams and Reynolds, above n 6; Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182; Campbell and Morris, above n 8.

<sup>14</sup> Evans and Evans, above n 1

offered by committees was severely limited in scope and ad hoc. My analysis of the strengths and weaknesses of the PJCHR, which was created after the Evans and Evans study, also provides a fresh perspective to test some of the recommendations made by these scholars to fill what they saw to be the gaps in rights protection within the parliamentary model.

From a deliberative democracy perspective, my research substantiates past findings made by Dalla-Pozza, Uhr and Halligan and suggests that the inquiry-based committees considered in my research not only provide meaningful deliberative forums but also deliver rights-enhancing results.<sup>15</sup> For example, I argue that the particular strengths of the LCA Committees, such as their diverse membership and capacity to attract a diverse range of submission makers,<sup>16</sup> should be considered when evaluating the contribution committees can make to Australia's parliamentary model of rights protection. I also recommend that such committees have a continuing role to play in scrutinising draft Bills and policy proposals, to improve the deliberative quality of law making at the pre-introduction phase. My research also suggests that the strong relationships the PJCIS has been able to forge with key law enforcement and intelligence agencies and national security experts, and the strong legislative impact that has followed, offer important new opportunities to improve the deliberative quality of law making at the federal level, potentially with rights-enhancing results.

Like Marsh,<sup>17</sup> Monk<sup>18</sup> and Uhr,<sup>19</sup> my research also supports the finding that parliamentary committees have much to offer in improving the quality of law making at the federal level, including at the pre-introduction stage. By documenting the influence of the SSCSB on the

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<sup>15</sup> See, eg, Dalla-Pozza, 'The Conscience of Democracy', above n 8; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (CUP, 1998) 219; Dominique Dalla-Pozza, 'Refining the Australian Counter-terrorism Framework: How Deliberative Has Parliament Been?' (2016) 27(4) *Public Law Review* 271, 274; John Halligan, 'Parliamentary Committee Roles in Facilitating Public Policy at the Commonwealth Level' (2008) 23(2) *Australasian Parliamentary Review* 135. See also Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

<sup>16</sup> As former Secretary to the LCA Committee Sophie Dunstone said: 'I really fundamentally believe that one of the real strengths of the, particularly the Senate committee system, is that you are facilitating a process that enables anyone from Jo Bloggs on the street through to some academic who's an expert in the field to provide their view and for Senators to have access to that information.' Interview with Sophie Dunstone, former Secretary of the Senate Standing Committee on Legal and Constitutional Affairs (Canberra, 23 May 2016).

<sup>17</sup> Ian Marsh, 'Australia's Representation Gap: A Role for Parliamentary Committees?' (Speech delivered at the Department of the Senate Occasional Lecture Series, Parliament House, Canberra, 26 November 2004).

<sup>18</sup> David Monk, 'A Framework for Evaluating the Performance of Committees in Westminster Parliaments' (2010) 16 *Journal of Legislative Studies* 1.

<sup>19</sup> Uhr, above n 15, 219.

work of parliamentary counsel and policy makers, for example, it is possible to see how those responsible for drafting and developing federal laws pre-empt committee scrutiny with rights-enacting results. As Byrnes,<sup>20</sup> and Campbell and Morris predicted,<sup>21</sup> this trend is also beginning to emerge with respect to the PJCHR, but could be considerably enhanced by adopting reforms to support the PJCHR's 'technical scrutiny' role and looking for ways to support the PJCHR working more closely with other committees in the system.

Finally, my research provides the basis for the further investigation of an emerging rights-scrutiny culture within the federal Parliament, with important implications for future options for reforming or replacing Australia's current model of rights protection. At its highest, this emerging rights-scrutiny culture could have the potential to deliver the type of outcomes Campbell was looking for in his 2006 proposal for the establishment of a 'democratic Bill of Rights' to be developed and applied exclusively by a parliamentary committee.<sup>22</sup> For Campbell, there was a need to improve upon Australia's pre-PJCHR model of parliamentary protection by investing a specific parliamentary committee with the power to generate a list of rights standards itself, and then scrutinise proposed laws for compliance with these rights standards.<sup>23</sup> That is, in effect, what I have observed occurring organically among the four committees studied in my thesis. In other words, it is possible to compile a list of common rights and scrutiny principles from the work of the PJCHR, SSCSB, PJCIS and LCA Committees in the context of their scrutiny of counter-terrorism laws that appear to resonate across political lines and attract public interest and submission maker support. Moreover, my research suggests that, when the committees make recommendations to improve a law's compliance with these rights-scrutiny principles, these recommendations are frequently reflected in legislative amendments. While further research is required to investigate whether this emerging rights-scrutiny culture applies in other contexts, it appears to have the type of democratically articulated and dynamic character that scholars such as Kinley, Campbell and

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<sup>20</sup> Andrew Byrnes, 'Human Rights Under the Microscope: Reflections on Parliamentary Scrutiny' (Speech delivered at Law Society of South Australia Continuing Professional Development Program, Adelaide, 11 December 2014) <<http://www.ahrcentre.org/sites/ahrcentre.org/files/mdocs/Byrnes%20-%20PJCHR%20-%20handout%20for%20Adelaide%20talk%20December%202014%20revised.pdf>>.

<sup>21</sup> Campbell and Morris, above n 13.

<sup>22</sup> Tom Campbell, 'Human Rights Strategies: An Australian Alternative' in Tom Campbell et al (eds), *Protecting Rights Without a Bill of Rights* (Ashgate, 2006) 319, 333.

<sup>23</sup> Ibid 333–6.

Morris considered to be integral for developing a model of rights protection that transcended the criticisms levelled at statutory or constitutionally entrenched bills of rights.<sup>24</sup>

Of course, my findings and recommendations depart in important respects from those of Campbell. Unlike Campbell, I do not recommend providing a constitutional backing for parliamentary committees, or a more proactive legislative development role for the PJCHR. However, like Campbell, my research suggests that parliamentary committees should play a central role in any future reforms to improve rights protection in Australia.

In addition, my research suggests that understanding this emerging rights-scrutiny culture could help identify opportunities to move the Australian Parliament away from what Levy and Orr describe as ‘conceptual balancing’ approaches to determining rights disputes, and towards ‘deliberative accommodation’ approaches, by highlighting the potential for parliamentary committees to encourage a broader range of views to be heard and evaluated in a meaningful way.<sup>25</sup>

When exploring these issues, I emphasise again that my research finds that parliamentary committees have had an important rights-*enhancing* impact on Australia’s counter-terrorism laws, but have rarely been able to completely remedy all of the rights-abrogating features of these laws.<sup>26</sup> These rights-abrogating features are so significant that, even if the changes recommended in this thesis were fully implemented, Australia’s counter-terrorism laws would still fail to comply with the full range of internationally recognised human rights and common law rights to which Australia subscribes. For this reason, I do not argue that improving the parliamentary committee system is *enough* when it comes to rights protection at the federal level. Rather I argue that understanding how the parliamentary committee system works and the overall impact it has on our laws is critical to improving the model of rights protection that

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<sup>24</sup> Campbell and Morris, above n 13; David Kinley, ‘Parliamentary Scrutiny of Human Rights: a Duty Neglected’ in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford University Press, 1999); David Kinley and Christine Ernst, ‘Exile on Main Street: Australia’s Legislative Agenda for Human Rights’ (2012) 1 *European Human Rights Law Review* 58.

<sup>25</sup> Levy and Orr, above n 15, 76-80.

<sup>26</sup> For examples of articles documenting the rights-infringing content of Australia’s counter-terrorism laws see George Williams, ‘The Legal Assault on Australian Democracy: the Annual Blackburn Lecture’ (2015) 18 *Ethos* 236; George Williams, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35(3) *Melbourne University Law Review* 1136; Gabrielle Appleby, ‘The 2014 Counter-terrorism Reforms in Review’ (2015) 26(1) *Public Law Review* 4; Andrew Lynch and Nicola McGarrrity, ‘Counter-terrorism Laws: How Neutral Laws Create Fear and Anxiety in Australia’s Muslim Communities’ (2008) 33(4) *Alternative Law Journal* 225.

is in place *now*, and should be carefully considered when thinking about introducing different models of rights protection in the future. By engaging with key participants in the system and gathering views on how laws should be scrutinised for rights compliance, my research may point to the most sustainable and pragmatic pathway towards the development of further legislative or judicial protections for commonly respected human rights.

### *C Conclusion*

The goal of my research was to evaluate the role played by parliamentary committees in Australia's parliamentary model of rights protection and identify practical options for reform. This goal was pursued against a background of scepticism amongst rights advocates about the capacity of the parliamentary committee system to make a meaningful contribution to rights protection and in the face of more than a decade of rights-abrogating counter-terrorism related legislative activity. The outcome of my research has been the articulation of a new perspective on the role played by parliamentary committees in rights protection in Australia, informed by a three-tiered analysis of their impact on 12 case study Acts, and in particular by insights obtained from key participants working closely within the committee system.

As a rights advocate who previously shared the conventional view about the inability of the parliamentary model to provide robust rights protection in Australia, the findings made in this thesis have been surprising and encouraging. The material presented in Part II suggests that parliamentary committees are having a rights-enhancing impact on Australia's counter-terrorism laws, and that in some cases this impact is quite profound. In particular, my research suggests that, when individual parliamentary committees work together as a system, they can effect rights-enhancing change at the policy development level, right through to the content of enacted provisions. They can smooth off rough edges of proposed laws that seek to extend executive power at the expense of individual rights, introduce safeguards to ensure access to review of executive decisions, and significantly limit the scope of proposed new law-enforcement and intelligence-gathering powers and new criminal offences. They can also work to focus the minds of public servants, parliamentary counsel and parliamentarians on the type of principles that should be observed when making laws that broaden the powers of the executive branch of government at the expense of individual rights, and offer analytical frameworks for balancing competing rights or interests. When the scrutiny approaches of these committees are well entrenched and respected, they can also lay the foundations for a rights-

scrutiny culture to emerge within the Parliament, and provide meaningful deliberative forums for those directly affected by these laws to express their views and concerns. They can also empower backbenchers and non-government members to push for amendments to proposed or existing laws that reflect the documented concerns of the Australian community, or the considered views of independent oversight bodies.

My research does not find that parliamentary committees alone are well placed to *remedy* unjustified or disproportionate intrusions into individual rights, or that they can singlehandedly sustain the type of rights culture that may be thought necessary for a country like Australia. Studies of the content of Australian laws, including counter-terrorism laws, consistently conclude that Australia trails behind its Western counter-parts when it comes to complying with international human rights standards, particularly when it comes to minority rights.<sup>27</sup> However, the findings made in this thesis suggest that rights advocates would be wise to re-think their past scepticism about the rights-enhancing capacity of the existing parliamentary committee system when seeking to improve the current parliamentary model of rights protection, or when developing proposals for more radical structural reform. In particular, my research demonstrates that investment in the parliamentary committee *system*, as well as in individual parliamentary committees, would greatly enhance the overall rights-enhancing impact of the current model.

My research finds that reflecting on the role and function of the broader Australian Parliament helps identify the best opportunities to invest in the parliamentary committee system's rights-enhancing capacity. For this reason, my recommendations are about making sure that the work of committees – which is already highly valued and respected – is readily available and accessible to those in a position to make decisions about the development and content of

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<sup>27</sup> For a comparative analysis of Australia's counter-terrorism laws and their impact on human rights see, eg, K Roach (ed), *Comparative Counter-Terrorism Law* (Cambridge University Press, 2015) 650–88; George Williams, Fergal Davis and Nicola McGarrity (eds), *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (Routledge, 2014); George Williams, 'Executive Oversight of Intelligence Agencies in Australia' in Z K Goldman and S J Rascoff (eds), *Global Intelligence Oversight: Governing Security in the Twenty-First Century* (Oxford University Press, 2006) first page?; George Williams, 'Anti-terror Legislation in Australia and New Zealand' in V Ramraj, M Hor, K Roach and G Williams (eds), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, 2<sup>nd</sup> ed, 2012) 541; Spencer Zifcak, 'Counter-terrorism and Human Rights' in John Menadue and Michael Keating (eds), *Fairness, opportunity and security* (ATF Press, 2015) 249; Rosemary Foot, 'The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29(2) *Human Rights Quarterly* 489; Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tullich, T, Anaian-Welsh R, Bronitt S and Murray S (eds) *Regulating Preventative Justice: Principle, Policy and Paradox* (Routledge, 2017) 136.

proposed laws. This means recognising the particular strengths and weaknesses of the different committees studied, while at the same time identifying ways to improve the quality of the interactions between different committees in the system. For example, my recommendations suggest that strengthening the behind-the-scenes impact of the technical scrutiny committees and promoting the deliberative opportunities provided by the inquiry-based committees could increase the rights-enhancing capacity of the system by ensuring that policy makers, legislative drafters and sophisticated submission makers have access to (1) the technical analysis they need to draw attention to the rights impact of a Bill and (2) a diverse range of views to generate less rights-abrogating policy alternatives at the public inquiry stage.<sup>28</sup> My recommendations also clarify the goals and objectives of newer committees such as the PJCHR, and encourage the use of innovative techniques such as the use of specialist secondees to preserve the already high legislative impact of committees such as the PJCIS.

While motivated by the findings of counter-terrorism case study, I recognise that further research is needed to confirm that the observations made in this study apply to other subject areas and to other individual committees. In particular, further research is required to determine whether the emerging rights-scrutiny culture I identify is applicable in other contexts. With these considerations in mind, the recommendations made in this thesis are not radical or profound, but rather pragmatic and incremental. They suggest investing in, rather than disrupting, the existing multi-stage rights review at the federal level. In developing these proposed changes, I have resisted my initial temptation to conclude that the rights-enhancing contribution of parliamentary committees is fatally flawed without significant structural change. I have been persuaded by the evidence collected during the case study, and in particular by the views and experiences of those interviewed. I am now of the view that the current parliamentary committee system has much to offer as a form of rights protection, because of, not in spite of, its central characteristics, which draw from the features and functions of the Parliament itself. For this reason, I look forward to future studies of how the *system* of parliamentary committees contributes to Australia's current model of rights protection, and how this system can be utilised in any alternative models of rights protection being considered

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<sup>28</sup> This would in turn bring the parliamentary committee system closer to what Levy and Orr describe as the 'deliberative accommodation' approach to resolving rights-related disputes, and enhance the quality of the multi-stage rights review identified by Stephenson. See Ron Levy and Grahame Orr, *The Law of Deliberative Democracy* (Routledge, 2016) 76-80; Scott Stephenson, *From Dialogue to Disagreement in Comparative Rights Constitutionalism* (Federation Press, 2016) 8, 211.

at the federal level. I hope this thesis contributes in some small way to this important body of work.



## APPENDIX A: QUALITATIVE RESEARCH DESIGN

### A *Introduction*

Chapter 2 introduced the methodology employed in my research. The qualitative analysis that features in Part II draws upon a series of semi-structured interviews, supported by documentary evidence, including Hansard debates, departmental guidance material, and parliamentary committee reports. As part of the broader methodology, which draws upon the Dickson Poon School of Law's *Effectiveness Framework*,<sup>1</sup> the views of participants obtained through the interviews are tested and supported by examples from academic literature, newspaper reports, and records of public speeches and conferences. As Chapter 2 explains, these views are also compared and contrasted with other 'tiers' of impact that rely predominately on documentary evidence. This Appendix provides a more explanation of the specific methodology employed during the interview process.

Forty interviews were conducted from May 2016 until December 2016. A list of interview participants (some of which have requested not be listed by name but rather by a more general descriptor) is provided at Appendix B. The interviewing process was preceded by obtaining the necessary ethical clearance from the University of Adelaide's Human Research Ethics Committee. My research was categorised as low risk.

### B *Selection of Interview Participants*

The primary research group for the interviews was past or current members of the four parliamentary committees studied and those with direct experience in developing, drafting, scrutinising or debating Commonwealth of counter-terrorism laws. This included:

- Members or Chairs of Parliamentary Committees tasked with scrutinising or reviewing counter-terrorism laws (including the Senate Standing Committees on Legal

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<sup>1</sup> Known as the 'Effective Parliamentary Oversight of Human Rights Project'. See Philippa Webb and Kirsten Roberts, 'Effective Parliamentary Oversight of Human Rights: A Framework for Designing and Determining Effectiveness' (Paper presented at the Dickson Poon School of Law, King's College London, University of London, June 2014) <<https://www.kcl.ac.uk/sspp/policy-institute/projects/government/assets/Human-Rights-Policy-DocumentsV5.pdf>>, Executive Summary.

and Constitutional Affairs, the Parliamentary Joint Committee on Intelligence and Security and predecessor committees, the Senate Standing Committee on the Scrutiny of Bills, and the Parliamentary Joint Committee on Human Rights);

- Secretariat staff of parliamentary committees tasked with scrutinising or reviewing counter-terrorism laws;
- Witnesses and submission makers to committees tasked with scrutinising or reviewing counter-terrorism laws;
- Parliamentary counsel involved with either (a) drafting of counter-terrorism laws or (b) reflecting on the outcomes of parliamentary scrutiny for training or advising purposes;
- Commonwealth public servants involved with either (a) development or review of counter-terrorism laws or policy and/or (b) reflecting on the outcomes of parliamentary scrutiny;
- Commonwealth public servants involved with training of other public servants in areas relating human rights, counter-terrorism law or policy, or parliamentary scrutiny;
- Independent review bodies or experts tasked with reviewing counter-terrorism laws; and
- Journalists or commentators who have covered the development, debate, enactment and review of counter-terrorism laws.

In order to identify the ‘hidden impacts’ of parliamentary scrutiny on Australia's counter terrorism laws (in line with the methodology outlined in Chapter 2), first priority was given to interview participants with direct experience in either:

- the development or review of counter-terrorism laws or policy and/or (for example parliamentarians who gave speeches on counter-terrorism laws in Parliament, public servants involved in preparing briefings for Ministers or cabinet or drafting Statements of Compatibility or Explanatory Memorandum, parliamentary counsel involved in drafting Bills or amendments, experts responsible for reviewing specific counter-terrorism laws); or

- parliamentary scrutiny of counter-terrorism laws (for example members or staff of parliamentary committees who conducted specific inquiries into counter terrorism laws).

Second priority was be given to participants with direct experience in:

- appearing before parliamentary committees tasked with reviewing counter-terrorism laws (for example witnesses or submission makers); and/or
- responding to or anticipating parliamentary scrutiny (for example public servants involved in preparing or applying drafting directions or policy manuals or commentators writing on the impact of parliamentary scrutiny on counterterrorism laws).

Within these groups, participants were not sampled through a representative selection. This was for practical and qualitative reasons. As Chapter 2 explains, my intention was not to interview a representative sample of parliamentarians, parliamentary staff or public servants but rather to obtain insights and perspectives from a range of key participants in the parliamentary committee system that could be used to supplement, test or add value to other (documentary-based) tiers of impact being evaluated in my research.

In this way, my research methods were qualitative, rather than statistical or representative. My sample selection was purposive<sup>2</sup> or conceptually driven<sup>3</sup> rather than random.<sup>4</sup> As Cho explains:

A qualitative researcher, through Qualitative Data Analysis (QDA) tends to follow a holistic, interpretivist approach of the notion that, the nature and existence of every object of the social world depend solely on peoples' subjective awareness and understanding of it. ... Qualitative research conducted by these subjectivists researchers produce rich and descriptive data that

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<sup>2</sup> Matthew B Miles and A Michael Huberman, *An Expanded Sourcebook: Qualitative Data Analysis* (Sage Publications, 2<sup>nd</sup> ed, 1994) 27; see also A J Kuzel 'Sampling in Qualitative Inquiry' in B F Crabtree and W L Miller (eds) *Doing qualitative research* (Sage Publications, 2nd ed, 1992) 31-44.

<sup>3</sup> Ibid, 27.

<sup>4</sup> Ibid; see also Kuzel, above n 2, 31-44.

are interpreted through identification, coding, sorting, and sifting of themes and texts leading to significant findings that can contribute to theoretical knowledge and practical use.<sup>5</sup>

This purposive sampling approach also allowed me to ‘cycle back and forth between thinking about the existing data and generating strategies for collecting new, often better, data’<sup>6</sup> and to regularly compare and reflect on any commonalities and contrasts that were emerging from the interview based material and the documentary-based evidence I was relying upon as part of my broader methodology.<sup>7</sup> Purposive sampling also allowed me to obtain participants with a diversity of attributes that would allow me to draw important contextual comparisons across my data. For example, within the sample, a combination of male and female participants were approached, as were participants with a cross section of political perspectives and different levels of experience and expertise.

As my interviews progressed, my sampling became more targeted. This was for two reasons. First, it was necessary to ensure that I maintained an appropriate balance in terms of political representation (for example, every time I received a positive response from a past or current member of the Coalition, I undertook efforts to also secure a positive response from a past or current member of the Australian Labor Party). Second, as my data analysis progressed, it became clear that the participant group that was most critical in terms of interview material was public servants. This due to the comparative absence of alternative sources of information about the perspectives of this group on the legitimacy and impact of formal parliamentary scrutiny of counter-terrorism law. By this stage, I had discovered other sources of information revealing the perspective of other participant groups (such as public commentators, parliamentarians and submission makers) as to the legitimacy and impact of the parliamentary committee system and the process of developing and enacting counterterrorism law.

As noted in Chapter 2, there were certain limitations within my participant sample predominantly relating to location and availability and familiarity with the author. I was based in Adelaide during the conduct of this research, and while I was readily able to travel to Melbourne, Sydney and Canberra, limited funding meant that I was unable to visit other

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<sup>5</sup> Muhammad Faisol Cho ‘Coding, Sorting and Sifting of Qualitative Data Analysis: Debates and Discussion’ (2015) 49 (3) *Quality and Quantity* 1135, 1135, references omitted.

<sup>6</sup> Miles and Huberman, above n 2, 50.

<sup>7</sup> Cho, above n 5, 1137, references omitted.

jurisdictions in person. However, given many of my sample groups were Canberra based, these limitations did not prove problematic when recruiting participants. In addition, interviews were conducted via telephone with participants in Western Australia and the Northern Territory.

As discussed further below, some sample groups were more difficult to reach than others, particularly those working in senior roles in national security related positions, such as ASIO officers and current Secretariat staff of the Parliamentary Joint Committee on Intelligence and Security. This group of potential participants have a range of specific professional and legal obligations preventing them from publicly discussing aspects of their work. To overcome these challenges I adopted a range of strategies, including approaching former PJCIS committee members and law enforcement policy officers that were more readily able to share insights into this aspect of law making without transgressing any relevant professional or statutory obligations. I also received valuable assistance from publicly available information, such as information contained in the PJCIS's Annual Report and the range of regular reports issued by the Department of the Senate. I also presented my research at two public conferences involving current and former Commonwealth parliamentary staff, which provided an opportunity for me to receive informal feedback on my preliminary conclusions relevant to this sample group.<sup>8</sup> In addition, as noted above, I was able to verify and confirm my conclusions with other sources documentary evidence, including transcripts of committee hearings and Hansards debates, giving greater depth to my research.

### *C Recruitment of Interview Participants*

The recruitment of participants was based on publicly available information in Hansard, Parliamentary Committee Reports, the Australian Parliament House website, Commonwealth Department Annual Reports, law journals, conference papers and published independent reviews of Australia's counter-terrorism laws. Names and contact details were obtained from

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<sup>8</sup> Sarah Moulds, 'Committees of Influence: Parliamentary Committees with the Capacity to Change Australia's Counter-terrorism laws', Presentation at the Australasian Parliamentary Study Group's Annual Conference, *The Restoration and Enhancement of Parliaments' Reputation* (October 2016, Adelaide); Sarah Moulds 'How does the Commonwealth Parliament Engage with "Rights" and "Justice"? The Case of Australia's Counter-terrorism Laws.' Presentation to the Australian Political Studies Association Conference -The Politics of Justice and Rights: challenges and future directions 2016, (September 2016, Sydney).

publicly available sources, including online government directories and departmental and parliamentary Annual Reports. Potential participants were approached by telephone or email.

In order to achieve a balanced coverage of the participant groups identified above, I initially anticipated that I would require a sample size of around 15-25 interviews. When approaching participants from the sample group, I anticipated that I would receive a relatively high rate of negative responses due to some of the limitations described above and below. For this reason, I prepared a spread sheet identifying participants in three categories: 'first approaches' (for those participants that I had identified as highest priority), 'second approaches' (to try if I received negative responses to the first approaches category) and 'third approaches' (to try as a last resort). This totalled just over 60 potential participants.

I was pleased to receive a relatively high rate of positive responses to my 'first approaches' category, securing around 20 interviews from this cohort. The vast majority of negative responses received were from participants who no longer held professional positions relevant to my research, current parliamentarians who had policies of not assisting with research requests of any nature, and parliamentary staff that cited their professional obligations not to disclose information relating to their committee work.

A number of these first 20 participants were instrumental in providing suggestions and contacts for further interview participants. With this information, combined with approaches to a number of participants in the 'second approaches category, I was readily able to exceed my initial target of 25 interviews.

By the end of the interview process, I had conducted a total of 40 interviews. Two interviewees did not consent to be listed as participants in my research. A further participant withdrew from my research following review of a draft Thesis, having expressed support for my research objectives but reconsidered their willingness to be quoted or listed as a participant. The other 37 participants are listed or described at Appendix B.

When approaching participants by email, or when following up telephone approaches, participants were provided with an overview of the project and its goals, together with a package of Participant Information (extracted below) which included the key themes and topic areas that I intended to cover in the interviews. In this package of information I emphasised that I was not looking to ascertain any confidential information.

Once I received a positive response from a potential participant, I arranged a time and place for the interview to take place. I also offered to provide further detail of the type of questions I intended to ask at the interview. On a number of occasions, participants requested this further detail, which I provided well in advance of the interview date.

Most interviews lasted approximately one hour. Interviews were conducted at the place most convenient to the participant, which was often their workplace, although a small number were conducted elsewhere. Nine interviews were conducted via telephone.

#### D *Development of Interview Topics*

As noted below, the interviews were conducted on a semi-structured basis, with the consistent use of key interview topics, coupled with a more flexible strategy to explore the particular experiences and insights of the interviewee.

The key interview topics were initially developed having regard to the broader methodology employed in my research and described in Chapter 2. In particular, the interview topics were developed having careful regard to the Dickson Poon School of Law's *Effectiveness Framework*,<sup>9</sup> that includes a specific focus on the 'hidden' or 'behind-the-scenes' impact of human rights scrutiny<sup>10</sup> and explicitly enquires into whether or not key participants in human rights oversight mechanisms consider the mechanism to be 'legitimate' or not.<sup>11</sup> On this basis, the interview topics included:

- Professional biographical information about the participant's involvement in either (a) the development or review of counter-terrorism laws or (b) parliamentary scrutiny functions;

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<sup>9</sup> Webb and Roberts, above n 1, Executive Summary.

<sup>10</sup> Such as the development of formal processes for identifying rights compatibility issues early in the policy or legislative development process; awareness raising of rights scrutiny principles among public servants, and general perspectives about the legitimacy of parliamentary scrutiny in debates on public policy or the legislative process.

<sup>11</sup> The Dickson Poon *Effectiveness Framework* also draws upon methods of assessing effectiveness deriving from organisational effectiveness theory, as well experience from a range of jurisdictions that have undertaken assessments of existing parliamentary oversight mechanisms.

- Specific instances of parliamentary scrutiny that the participant has been involved in, with a focus on the development, scrutiny or review of counter-terrorism law;
- The impact the work of parliamentary committees on the participant's professional role;
- The participant's perspective as to the legitimacy effectiveness of the parliamentary committee system in terms of (a) legislative impact (b) other visible impacts and (c) hidden impacts ;
- The participant's perspective as to which particular features of the current parliamentary scrutiny system work well and why.

### E *Conduct of Interviews*

The interviews took between 25 minutes and 1.5 hours. They were conducted in a semi-structured manner around those topics that had been provided to the participants in the Information Sheet (extracted below). As noted above, nine interviews were conducted over the telephone and the remaining 31 were conducted in person. The in person interviews were audio recorded through the use of a discrete dictaphone recorder and with the explicitly consent of the interviewee. The in person interviews generally allowed for a stronger level of rapport to be built between myself and the interviewee however, I did not feel that the telephone interviews suffered in any significant way as a result. In addition, with respect to a number of the telephone interviews, I had previously met with and established a professional rapport with the interviewee that was readily re-established on the phone.

Reflecting on the Dickson Poon *Effectiveness Framework* and the past evaluations of parliamentary committees discussed in Chapter 2, I made a deliberate decision to adopt a semi-structured approach to the interviews. This allowed me to allow the participant to take the lead in terms of describing their perspectives and experiences relevant to the parliamentary committee system and/or the development and enactment of counter-terrorism law. When used in conjunction with the more structured interview topics, this technique allowed me to gather detailed and unique insights, while ensuring that there was sufficient similarity across subject areas to allow data to be compared across relevant variables. This approach also allowed me to question participants about contrasting views that I had obtained from other sources, and to test findings I had made through my analysis of documentary based evidence.



Each interview began with an explanation of the project, and outlined the participant's rights and choices regarding confidentiality and anonymity. I explained that they could request complete anonymity; confidentiality or anonymity regarding some matters as they arose in the course of the interview; or ask for anonymity or confidentiality (whether partial or complete) when I provided the participant with the final draft of the Thesis for their review. I also advised participants that in line with the Ethics Approval received for my research, they were free to withdraw their participation at any time. At the time of interview, most participants opted to allow me to use their comments subject to any requests as to confidentiality or anonymity made during the interview itself. Some participants also indicated that they would review their position of confidentiality/anonymity when they saw the draft thesis.

Participants were asked about their professional biographical information, as well as what they would consider to be the most important features of their job, or those aspects of their job that they consider are most relevant to the parliamentary scrutiny system.

Participants were then asked for their reflections on the overarching purpose or goal of the parliamentary committee system from their perspective, and whether they considered the system (or a particular component of the system with which they had direct engagement) was effective at achieving this goal. This was an important initial question to elucidate comments relevant to 'legitimacy', discussed in detail in Chapter 4.

Participants were then asked to provide examples of specific instances of parliamentary scrutiny that the participant had been involved in, for example as a member of a parliamentary committee or as a witness or submission maker to a parliamentary committee. This then led to questions encouraging reflections on the relevant processes and procedures of the particular committee, and the impact their participation in this process had on other aspects of their work and/or their decision making regarding the development and enactment of counter-terrorism laws. This was regularly followed by questions relating to how the participant managed workloads and time pressures and whether and how the participant may have engaged with other participants in the committee system.

Participants were then asked for their reflections on how to measure the impact of parliamentary committees on their role in the law making process, with particular attention directed towards any specific experiences with the case study Bills. Finally, participants were asked whether there were any other sources of information, or potential interview participants, that I should consult as part of my research.

At the end of the interview I asked each participant whether there was any issues I may have missed or any weaknesses in my methodology. I then outlined the next steps in my research, noting that I would provide the participant with a copy of the draft Thesis before it was submitted, that they would be able to request anonymity or confidentiality with respect to any of the material used, even where they had not indicated the material was confidential during the interview.

## F *Data Analysis*

When I was undertaking analysis of the interview material I relied extensively on Dickson Poon *Effectiveness Framework* and the framework contained in *An Expanded Sourcebook: Qualitative Data Analysis* by Miles and Huberman. As explained in Chapter 2, the Dickson Poon *Effectiveness Framework* provided the template for my tiered approach to measuring the impact of parliamentary committees on the development and enactment of the case study Bills. The ‘hidden’ tier of impact (described in detail in Chapter 7) was particularly relevant to my analysis of the interview material. I combined this analytical approach with the more specific techniques set out by Miles and Huberman, which focus on three ‘flows of activity’: data recording (including coding and note taking); data display (organizing and comparing data to facilitate analysis); and conclusion drawing and verifications (including noting regularities, patterns, explanations, possible configurations, causal flows and propositions).<sup>12</sup>

The first of these flows of activity involved transcribing the tape recordings of the in person interviews into written form, with the assistance of contemporaneous notes that I had made at the time of the interview. These notes included my initial reflections on the interview as well as ideas on the main themes in my Thesis, relationships with previous interviews or any ideas where I may find further information on particular examples provided by the participant.

The process of transcribing the tape recordings into a written form proved to be a highly valuable component of my data analysis. It allowed me to reflect in further detail on the responses by participants and provided the starting point for the development of codes that I later employed to identify and explore relationships and patterns in my broader data set.

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<sup>12</sup> Miles and Huberman, above n 2, 10-12.

Following transcription, I utilised the NVIVO software to develop a set of specific ‘codes’ to classify the interview material and to explore relationships, commonalities and contrasts between interviews. As Miles and Huberman describe, coding is an iterative and dynamic process, with codes changing and developing as new material is analysed.<sup>13</sup> I commenced coding my interviews when I had approximately 20 (or 50%) completed. At this stage, I applied the codes I had developed based on my legal analysis and the development of the broader methodology for my research. These included general codes such as ‘evidence of hidden impact’, ‘comments on strengths of the committee system’, ‘language used in rights based discussions’, as well as more specific codes such as ‘comments on a specific case study Bill’ or ‘comments on the Bills drafting process. When I revisited each code as part of the Thesis drafting process, the relationships between these different combinations provided to be a highly useful component of my data analysis.

The NVIVO software allowed me to refine, search and display my coded data quickly and easily and to modify existing codes or introduce new codes.<sup>14</sup> I was also able to group my codes and add the key ‘attributes’ of each participant (such as whether they were public servants, or whether they were current or former parliamentarians). This allowed for high particularised searching and comparison of data.<sup>15</sup>

## G Data Display

Miles and Huberman provide a range of useful examples of how to display qualitative research data in accessible format, including through the use of matrices<sup>16</sup> which I adopted both as a

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<sup>13</sup> Miles and Huberman, above n 2, 61.

<sup>14</sup> For further discussion of the use of NVIVO software for coding and displaying data see P Bazeley, and K Jackson, K. (eds.) *Qualitative data analysis with NVivo* (Sage Publications Limited, 2013,).

<sup>15</sup> As Elaine Welsh has observed, “The searching tools in NVivo allow the researcher to interrogate her or his data at a particular level. This can, in turn, improve the rigour of the analysis process by validating (or not) some of the researcher's own impressions of the data.” Elaine Welsh, ‘Dealing with Data: Using NVivo in the Qualitative Data Analysis Process’ (2002) 3(2) *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* 1, 12.

<sup>16</sup> Miles and Huberman, above n 2, 93.

data analysis tool and as form of data display in my research. As the authors note, “[t]his display is especially helpful for understanding the flow, location, and connection of events.”<sup>17</sup>

I used matrix tables to display both my interview-based data and data obtained through other sources such as Hansard debates, media reports and legislative amendments to Bills. The use of matrix tables to display my data was particularly appropriate in light of the three tier methodology I employed drawing upon the approach adopted by the Dickson Poon *Effectiveness Framework*. It allowed me to display data by case study Bill and/or by particular parliamentary committee. It also allowed me to quickly identify trends and contrasts that could be explored more fully in the explanatory text.

My preliminary matrix tables were highly detailed and of great use to me in collating different variables to allow for the systematic comparison of responses across the whole data set, and within categories of participants, and across particular case study bills. However, these long and detailed tables required significant editing to be accessible as part of the final Thesis. As a result, the matrix tables included in my Thesis are generally ‘summary tables’, supported by further detail in the Appendices and in the text of the Thesis itself.

## H *Conclusion Drawing and Verification*

My approach to drawing and verifying findings and conclusions in my research was influenced heavily by the broad methodology outlined in Chapter 2 and informed by the Dickson Poon *Effectiveness Framework* and other past evaluations of parliamentary committees set out in that Chapter.

When it came to drawing conclusions on questions of legitimacy (described in detail in Chapter 4) and hidden impact (described in detail in Chapter 7), the interview material proved critical. The coding, data displays and memoing techniques described above greatly assisted me to identify themes and drawn conclusions from this material. Revisiting the interview transcripts also helped me to verify some of the findings I had developed in these chapters. The matrix displays were particularly useful as they allowed me to find patterns and relationships that formed the core of my findings and then verify these through providing substantiating examples

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<sup>17</sup> Ibid.

and repetition.<sup>18</sup> They also allowed me to reflect on the interaction between the different ‘tiers of impact’ being employed in my research. For example, I could quickly compare those case study bills that received high numbers of parliamentary debates, with those that generated strong media commentary, and then use this to help substantiate key findings on public impact. I was also able to compare those committees that were considered highly legitimate by a wide range of key participants, with those committees most likely to influence the policy development and legislative drafting process.

By the end of this analysis I was confident that, while there were limitations in my study (see below and Chapter 2), the key findings I had made were reliable and sound. In particular, I was confident that the individual interviews conducted provided valuable insights into the operation of parliamentary committees more generally.

### I *Participant Review*

In accordance with my ethics approval, once I had a complete and almost final draft of my Thesis I provided anonymised copies to each participant for their comment. I decided to provide my participants with the full Thesis, so that they would gain an understanding of the context in which they were quoted. I provided each participant with an anonymous number, only informing each individual which number they had been allocated and drawing their attention to references in their interview (through electronic highlighting).

This was a very rewarding exercise. Participants responded with interest to my research and some provided additional comments and insights that assisted in the finalisation of my key findings and recommendations. There were only a small number of occasions where participants requested that comments be removed or anonymised. In most instances I was able to agree with the participant on alternative wording that sufficiently anonymised them or the particular issue they were describing, thus still relying on their views and experiences in my analysis. For example, some interviewees consented to being listed as participants in my

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<sup>18</sup> I used the ‘tactics’ outlined in Miles and Huberman, above n 2, 286, see also Chapter 10. Tactics include: forming patterns, looking at contrasts, clarifying relationships, rigorous testing, looking at exceptions.

research, but requested that their comments remain anonymous in the text of the Thesis. Other interviewees asked to be referred to only by position title rather than by name.

In one instance, a participant asked to withdraw from my research. In reaching this position, this participant provided valuable feedback on my research, and assisted in locating other useful sources of information for the material originally provided in the interview. This participant had no concerns with the key findings in my research or my approach to the original interview but had reached the view that they no longer wished to be listed as a participant or referred to any way in my research.

## *J Limitations of Study*

Chapters 1 and 2 discuss the benefits and challenges associated with selecting a case study to undertake a qualitative analysis of this kind. These Chapters explain that the use of the counter-terrorism case study has many strengths, including its ongoing relevance as one of the most significant, rights-engaging areas of Commonwealth legislative activity in recent decades. These Chapters also explain that the counter-terrorism case study may have some exceptional features that may influence the broad applicability of the findings made in my research. As noted in Chapters 1 and 2, the Thesis employs a range of strategies to guard against this risk. However, it is also possible that particular qualities of the counter-terrorism case study had an influence on the responses I received to requests for interviews with key participants and on the interviews themselves. For example, some potential participants may have declined my request for an interview due to concerns about discussion matters relevant to national security. Others may have tempered their answers to my questions having regard to the broader political and policy context associated with developing and enacting national security related laws and policies. As noted above, some potential participants (such as current secretariat staff of the PJCIS) are subject to strict disclosure and confidentiality requirements which limit their ability to discuss certain national security related matters.

This potential for self-regulation among interview participants is always present in qualitative research of this kind. As Fielding and Thomas explain:

Qualitative research that relies upon interviews always raises the possibility of a degree of (even subconscious) self regulation by participants. Participants are informed that they will be involved in a study about [a certain topic] ....., and there is a tendency to paint the most 'proper' picture – whether that be in accordance with professional ethical standards, their own

self-image or attempts to 'please' the researcher who may be giving sub-conscious clues themselves as to the answers they are seeking.<sup>19</sup>

While it is not possible to rule out the potential for this type of self-regulation among the participants in my research, there are a number of factors that support the veracity and quality of the interview material I obtained. These factors include:

- The relatively large sample size for a study of this kind (40 separate interviews);
- The relatively high acceptance rate for those potential participants in the 'first approaches' category;
- My clear intention to focus the interview on the scrutiny experience (rather than the detailed national security context) and assurance that I was not seeking any confidential or sensitive information;
- My interest in exploring and documenting the positive contribution parliamentary committees make to the law making process at the Commonwealth level;
- The use of 'warm referrals' by other interviewees;
- The timing of the proposed interviews (which was during the caretaker period between the 44<sup>th</sup> and 45<sup>th</sup> Parliament);
- The provision of draft questions and detailed information about the nature of my research in advance of the interview;
- The option of providing comments on an anonymous basis, and the opportunity to review my research prior to submission; and
- The reflective and thoughtful nature of the interview material itself, which suggests that participants felt comfortable discussing the key interview topics with me and were prepared to offer both positive and critical perspectives on the parliamentary committee system and the counter-terrorism law making process.

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<sup>19</sup> Nigel Fielding and Hilary Thomas, 'Qualitative Interviewing' in Nigel Gilbert (ed) *Researching social life* (Sage, 2nd ed, 2008) 245.

For these reasons, and having regard to the strategies outlined in Chapters 1 and 2, I am confident of the quality and reliability of the interview material used in this Thesis and the broader applicability of my research to other fields of law making. However, as discussed in Chapter 9, I also recommend further research in this area improve the comprehensiveness of our understanding of the impact of the Commonwealth parliamentary committee system.

It is also important to note that I approached this research as somewhat of an ‘insider’, having previously appeared before parliamentary committees in my role as policy officer at the Law Council of Australia and obtained insights into the role of committee members as a former legal affairs advisor to a Senator. I was conscious of the need to be transparent about these past roles with my interviewees and ensured that I explained these past roles as part of my introduction to my research.

In many ways, these past experiences were beneficial when developing and testing my methodology and when identifying possible participants for my research. As Unluer explains, being an ‘insider’ when conducting qualitative research has a number of advantages, including:

having a greater understanding of the culture being studied; (b) not altering the flow of social interaction unnaturally; and (c) having an established intimacy which promotes both the telling and the judging of truth. Further, insider-researchers generally know the politics of the institution, not only the formal hierarchy but also how it “really works”. They know how to best approach people. In general, they have a great deal of knowledge, which takes an outsider a long time to acquire.<sup>20</sup>

However, being an ‘insider’ when conducting qualitative research can also generate risks. For example, Unluer warns that greater familiarity with the subject matter and the key participants can give rise to a ‘loss of objectivity’ or lead the researcher to unconsciously make ‘wrong assumptions about the research process based on the researcher’s prior knowledge’.<sup>21</sup>

I am confident that these risks did not materialise in the context of my research. This is evident from the fact that, following my analysis of the data I collected, I changed my own views on

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<sup>20</sup> Sema Unluer, ‘Being an Insider Researcher While Conducting Case Study Research’ (2012) 17(29) *The Qualitative Report*, 1-14, 1 (references omitted). See also A Bonner and G Tolhurst ‘Insider-Outsider Perspectives of Participant Observation’ (2002) 9(4) *Nurse Researcher* 7-19.

<sup>21</sup> Ibid.



the rights enhancing impact of parliamentary committees in a number of fundamental respects. This is documented in Chapters 1 and 9 of the Thesis. As noted above, I also employed a range of strategies (including openly welcoming challenges to my methodology and draft findings by interview participants and others) to ensure that I had not unconsciously allowed my previous experiences with the parliamentary committee system prejudice my key findings.

## **PARTICIPANT INFORMATION SHEET**

**PROJECT TITLE:** Balancing Security and Liberty: An Evaluation of Australian Parliamentary Scrutiny of Counter-Terrorism Laws

**HUMAN RESEARCH ETHICS COMMITTEE APPROVAL NUMBER: H-2016-083**

**PRINCIPAL INVESTIGATOR:** Associate Professor Laura Grenfell.

**STUDENT RESEARCHER:** Sarah Moulds

**STUDENT'S DEGREE:** PhD, Law

Dear Participant,

You have been invited to participate in an interview for the purpose of the PhD research project, 'Balancing Security and Liberty: An Evaluation of Australian Parliamentary Scrutiny of Counter-Terrorism Laws'. This Information Sheet will provide some background about the larger PhD research project of which these interviews form a part. It will also explain the purpose of the interviews and the format they will follow, as well as outlining arrangements relating to confidentiality and use of data. You have also been provided with a Consent Form and a sheet with information on the Independent Complaints Procedure.

### **What is the project about?**

The Australian parliamentary system includes a number of important checks and balances, including the parliamentary committee system which serves as a way of reviewing, scrutinising and improving proposed laws before they are enacted. These parliamentary committees can consider whether the proposed law is necessary and effective at meeting its objective, as well as its impact on individual rights and liberties or on other important Australian values or legal principles. Parliamentary committees are complemented by other mechanisms designed to assist scrutiny of proposed laws, such as the requirement to accompany Bills with Explanatory Memorandum and Statements of Compatibility with Human Rights. This formal parliamentary scrutiny system has been considered to be particularly critical at the Commonwealth level, where there is no Charter or Bill of Rights, as a mechanism to guard against unjustified or disproportionate interference with individual rights.

This project aims to evaluate how well this formal parliamentary scrutiny system is working, and looks particularly at the experience of Australia's counter-terrorism laws as a way to highlight the key features of parliamentary scrutiny and to identify the impact it has on the content of the law, the way the law is publicly debated and discussed and the 'behind the scenes' development of future laws and policies in this area. This project also aims to identify and discuss any common themes emerging from the different forms of parliamentary scrutiny of Australian counter terrorism laws and draw conclusions as to what these themes may mean for improving parliamentary scrutiny in the future.

### **Who is undertaking the project?**

This project is being conducted by Sarah Moulds.

This research will form the basis for Sarah's PhD, at the University of Adelaide under the supervision of Associate Professor Laura Grenfell and Dr Adam Webster.

### **What is the purpose of the interviews?**

There is a wealth of publicly available information about the formal parliamentary scrutiny system that will be carefully analysed in this research project. What is missing from this public record is a clear understanding of how this system works in practice, from the perspective of people like you who are involved in its day to day operation.

To get a full understanding of how these processes work, I will conduct interviews with past and current Senators and Members of Parliament, secretariat staff of relevant parliamentary committees, parliamentary counsel, public servants, political advisors, submission makers and witnesses involved in relevant parliamentary committee inquiries and other experts and public commentators.

The interviews will be particularly useful for identifying the 'behind the scenes' impacts of parliamentary scrutiny on counter-terrorism laws that are otherwise hidden from public view. For example, interviews conducted with those involved in either the development of counter-terrorism laws or the parliamentary scrutiny process, or both, may help identify:

- whether certain parliamentary committees are more effective at undertaking scrutiny of counter-terrorism laws and if so, why;
- whether common themes can be identified as emerging from the findings of parliamentary committees with respect to counter-terrorism laws;
- whether the findings of past parliamentary committee inquiries are considered when developing proposals of new counter-terrorism laws, or when proposing changes to those laws;
- whether parliamentarians and their staff find the reports of parliamentary committees helpful in their deliberations and decision making; and
- whether the staff of parliamentary committees have insights into what processes or practices are working well or need improvement.

Interviews will be conducted with 20-30 participants.

### **How will the interview be conducted?**

The interview will take place in your office or at another suitable public venue, such as a quiet cafe. The duration of the interview is expected to be no more than one hour, depending on the time you have available. With your permission, the interview will be recorded electronically and will later be transcribed by the interviewer. If you would prefer that the interview not be recorded, the interviewer will take handwritten notes.

The interviews will be semi-structured, covering a number of specified general areas. These will be similar for each interview, but will focus on different aspects of the formal parliamentary scrutiny process, depending on your experience. The general areas covered will include:

- Professional biographical information your involvement in either (a) the development or review of counter-terrorism laws or (b) parliamentary scrutiny functions;
- Specific instances of parliamentary scrutiny that you have been involved in, with a focus on the development, scrutiny or review of counter-terrorism laws;
- The impact of parliamentary scrutiny on your professional role, for example whether findings of parliamentary committees have been a relevant factor when voting on a particular Bill or amendment, or as a consideration when providing legal or policy advice;
- Your perspective as to the effectiveness of the parliamentary scrutiny in terms of (a) legislative impact (b) other visible impact and (c) hidden impact;
- Your perspective as to which particular features of the formal parliamentary scrutiny system work well and why.

### **Anonymity and confidentiality**

The interviews are not designed to illicit any confidential, security sensitive or politically sensitive information, but rather to gain an insight into how the publicly known systems of parliamentary scrutiny, such as the parliamentary committee system, work in practice. For this reason, it is hoped that many interviewees will be able to readily consent to having the content they provide attributed to them.

It is possible that when discussing their work or parliamentary processes, interviewees may disclose negative information that may impact upon the career. However, if you agree to participate, you may choose to keep all of the information you provide anonymous; or you may choose that certain parts of the interview be kept anonymous. You can also ask that certain information or answers not be used directly by the researcher. It must be noted however, that due to the nature of the project, it is possible that you may be identifiable despite measures taken to protect your confidentiality.

### **Consent**

You have been provided with a consent form, which you can sign when the interview takes place. If you do not sign the consent form, no data from your interview can be used. You are free to withdraw from the study, or to withdraw any information provided through the interviews, at any time before the thesis is submitted for examination.

**How will the interview information be used?**

All hard copy notes, transcripts and recordings of the interviews will be kept in a locked cabinet at the Adelaide Law School. All electronic data will be stored in a password-protected account on the University of Adelaide network. This data will be accessed only by the PhD candidate and supervisors. The data will be kept for the duration of the research project plus five years (in accordance with the requirements of the Australian Code for the Responsible Conduct of Research), after which time, unless further consent is obtained from you, it will be destroyed using confidential destruction methods.

The interview data will be analysed against background research based on documentary sources, in order to provide commentary on effectiveness of parliamentary scrutiny in the context of Australia's counter-terrorism laws. The findings will be incorporated into a PhD thesis which will be submitted for examination and will then be publicly accessible.

It is possible that the PhD thesis will be the basis for further published research such as a book or journal article. If the researchers wish to use any material obtained from your interview in this further research, they will seek your written permission.

**Further information?**

The study has been approved by the Human Research Ethics Committee at the University of Adelaide (approval number H-2016-083). If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the Principal Investigator. Contact the Human Research Ethics Committee's Secretariat on phone +61 8 8313 6028 or by email to [hrec@adelaide.edu.au](mailto:hrec@adelaide.edu.au). If you wish to speak with an independent person regarding concerns or a complaint, the University's policy on research involving human participants, or your rights as a participant. Any complaint or concern will be treated in confidence and fully investigated. You will be informed of the outcome.

Yours sincerely,

**Associate Professor Laura Grenfell  
Moulds**

**Dr Adam Webster**

**Sarah**

## CONSENT FORM

1. I have read the attached Information Sheet and agree to take part in the following research project:

|                                |   |
|--------------------------------|---|
| <b>Title:</b>                  | Balancing Security and Liberty: An Evaluation of Australian               |
| <b>Ethics Approval Number:</b> | <del>Parliamentary Scrutiny of Counter Terrorism Laws</del><br>H-2016-083 |

2. I have had the project, so far as it affects me, fully explained to my satisfaction by researcher Sarah Moulds. My consent is given freely.
3. I acknowledge that I have read the attached Participant Information Sheet: *Balancing Security and Liberty: An Evaluation of Australian Parliamentary Scrutiny of Counter-Terrorism Laws*
4. I understand that:
- a. I am free to withdraw from the project at any time without any reasons given for my withdrawal until the completion of the research project by contacting Sarah Moulds.
  - b. The information I provide will be used for the purpose of the research project named above and the information I provide cannot be used for any other research project or by other researchers without my consent.
  - c. While I understand that I will not be asked to share confidential information, if I request (below), the anonymity and/or confidentiality of the information I provide in this interview will be safeguarded subject to any relevant legal requirements.
  - d. I request that all of the information I provide in this interview be kept anonymous:

**Yes / No (please circle).**

- e. I request that the answers to particular questions be kept anonymous and/or confidential if I indicate this in the course of the interview:

**Yes / No (please circle).**

- f. Despite the guarantee of anonymity made above, it is nonetheless possible that, due to the nature of the project, someone may still be able to identify me as the source of information provided to Sarah Moulds.
- 5. I will be sent a draft copy of any extract of interview or information attributed to me (either expressly or anonymously) before the research project is complete.
- 6. The information I provide in this interview will be accessed in the course of the research project only by Sarah Moulds and her supervisors.
- 7. I consent to my interview being audio-taped for the purpose of ensuring accuracy of the transcript:

**Yes / No (please circle).**

- 8. I am aware that I should keep a copy of this Consent Form, when completed, and the attached Information Sheet.

**Participant to complete:**

Name: \_\_\_\_\_ Signature: \_\_\_\_\_

Date: \_\_\_\_\_

**Researcher/Witness to complete:**

I have described the nature of the research to

\_\_\_\_\_

*(print name of participant)*

and in my opinion she/he understood the explanation.

Signature: \_\_\_\_\_ Position: \_\_\_\_\_

Date: \_\_\_\_\_

## The University of Adelaide

### Human Research Ethics Committee (HREC)

## CONTACTS FOR INFORMATION ON PROJECT AND INDEPENDENT COMPLAINTS PROCEDURE

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

|                         |  |
|-------------------------|--|
| <b>Project Title:</b>   | <b>Balancing Security and Liberty: An Evaluation of Australian</b><br><del><b>Parliamentary Scrutiny of Counter Terrorism Laws</b></del> |
| <b>Approval Number:</b> | <b>H-2016-083</b>  |

The Human Research Ethics Committee monitors all the research projects which it has approved. The committee considers it important that people participating in approved projects have an independent and confidential reporting mechanism which they can use if they have any worries or complaints about that research.

This research project will be conducted according to the NHMRC National Statement on Ethical Conduct in Human Research (see <http://www.nhmrc.gov.au/publications/synopses/e72syn.htm>)

1. If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the project co-ordinator:

|               |  |                                      |
|---------------|--|--------------------------------------|
| <b>Name:</b>  | <b>Associate Professor Dr Laura Grenfell</b> | <b>Sarah Moulds (Ph D Candidate)</b> |
| <b>Phone:</b> | <b>(08) 8313 5777</b>                        |                                      |

2. If you wish to discuss with an independent person matters related to:

- making a complaint, or
- raising concerns on the conduct of the project, or
- the University policy on research involving human participants, or
- your rights as a participant,

contact the Human Research Ethics Committee's Secretariat on phone (08) 8313 6028 or by email to [hrec@adelaide.edu.au](mailto:hrec@adelaide.edu.au)

## **Indicative List of Interview Topics and Questions for 'Balancing Security and Liberty: An Evaluation of Australian Parliamentary Scrutiny of Counter-Terrorism Laws'**

The interviews for this project will be semi-structured. Similar topics will be covered in each interview to allow for comparison of data. It is expected that most interviews will cover the general topics identified in this document. The specific questions in this document are examples of questions that may be asked. It is possible that, because of the circumstances of a particular interview, some of these questions may be omitted and other questions not listed here may be asked.

### **A. Professional biographical information**

- Please describe your current professional role.
- Have you had any direct involvement in the development or review of counter-terrorism laws in your current role, or in any former professional role?
- Have you had any direct involvement in the formal system of parliamentary scrutiny, for example participation in a parliamentary committee inquiry, in your current role, or in any former professional role?

### **B. Questions about your involvement in the development or review of specific counter-terrorism laws**

- Please describe the specific counter-terrorism law, or proposed law or amendment, that you have been involved in developing or reviewing.
- Thinking about this law or proposed law, please describe your role in the development or review process.
- What factors did you consider when undertaking this role?
- Was parliamentary scrutiny - including the prospect of future parliamentary scrutiny or the findings of previous parliamentary scrutiny - a relevant factor?
- If so, how was this considered/applied and what impact did it have on the outcome?

### **C. Questions about your involvement in specific instances of parliamentary scrutiny**



- Please describe any specific parliamentary committee inquiry/ies or scrutiny report/s relating to counter-terrorism laws that you have participated in.
- Please describe your role in this scrutiny process.
- What were the key issues /most contentious issues arising in this inquiry/scrutiny report, and what language was used to describe these issues?
- What considerations were most important to you in your role in this inquiry/scrutiny report?
- What was the outcome of this inquiry/scrutiny report?

**D. The impact of parliamentary scrutiny on your professional role**

- How did you become aware of the formal system of parliamentary scrutiny (including the committee system and other related mechanisms such as Statements of Compatibility) at the Commonwealth level?
- Have you received any training about the formal system of parliamentary scrutiny?
- Does the work of parliamentary committees, or parliamentary scrutiny of proposed or existing laws impact on your professional role? If so, in what form, and what features of this scrutiny have the strongest impact?
- Do the requirements to prepare Explanatory Memorandum and /or Statements of Compatibility impact on your professional role? If so, in what form?
- Have any post enactment reviews of counter-terrorism laws impacted on your professional role?

**E. Your perspectives on any common themes emerging from the parliamentary scrutiny of counter-terrorism law**

- From your perspective, do any common themes emerge from the formal system of parliamentary scrutiny of counter-terrorism law

#### **F. Your perspective as to the effectiveness of the parliamentary scrutiny system**

- How would you describe the goal or objective of the formal system of parliamentary scrutiny and do you consider it to be a legitimate and valued part of the Australian parliamentary process?
- Thinking of the particular experiences discussed above, can you identify any impacts of formal parliamentary scrutiny on:
  - the content of Australia's counter-terrorism laws
  - the way Australia's counter-terrorism laws and publicly debated and discussed
  - the way counter-terrorism laws and policies are developed, implemented and reviewed
- Which particular features of the formal parliamentary scrutiny system work well and why?
- Which particular features of the formal parliamentary scrutiny system do not work well and why?

## ATTACHMENT F: CONFIDENTIALITY PROTOCOL

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

|                         |  |
|-------------------------|--|
| <b>Project Title:</b>   | <b>Balancing Security and Liberty: An Evaluation of Australian</b><br><del><b>Parliamentary Scrutiny of Counter Terrorism Laws</b></del> |
| <b>Approval Number:</b> | <b>H-2016-083</b>  |

This research includes interviews with past and current Senators and Members of Parliament, secretariat staff of relevant parliamentary committees, parliamentary counsel, public servants, political advisors, submission makers and witnesses involved in relevant parliamentary committee inquiries and other experts and public commentators.

Interview participants will have the option of being identified in any publication relating to the research. Where they do not wish to be identified, their names and, where possible, identifying details, will be omitted. However, due to the small sample size and the nature of the participant selection criteria, it may be impossible to guarantee anonymity in all cases. Participants will be advised of this limitation in the Information Sheet and in the Consent Form.

### **Anonymity and confidentiality**

The interviews are not designed to illicit any confidential, security sensitive or politically sensitive information, but rather to gain an insight into how the publicly known systems of parliamentary scrutiny, such as the parliamentary committee system, work in practice. For this reason, it is hoped that many interviewees will be able to readily consent to having the content they provide attributed to them.

It is possible that when discussing their work or parliamentary processes, interviewees may disclose negative information that may impact upon the career. However, if participants agree to participate, they may choose to keep all of the information they provide anonymous; or may choose that only certain parts of the interview be kept anonymous. Participants can also ask that certain information or answers not be used by the researcher.

### **Consent**

All participants will be provided with a consent form that must be signed prior to the interview taking place. Participants are free to withdraw from the study, or to withdraw any information provided through the interviews, at any time before the thesis is submitted for examination.

### **How will the interview information be used?**

All hard copy notes, transcripts and recordings of the interviews will be kept in a locked cabinet at the Adelaide Law School. All electronic data will be stored in a password-protected account on the University of Adelaide network. This data will be accessed only by the PhD candidate and supervisors. The data will be kept for the duration of the research project plus five years (in accordance with the requirements of the Australian Code for the Responsible Conduct of Research), after which time, unless further consent is obtained from the participant, it will be destroyed using confidential destruction methods.

The interview data will be analysed against background research based on documentary sources, in order to provide commentary on effectiveness of parliamentary scrutiny in the context of Australia's counter-terrorism laws. The findings will be incorporated into a PhD thesis which will be submitted for examination and will then be publicly accessible.

It is possible that the PhD thesis will be the basis for further published research such as a book or journal article. If the researchers wish to use any material obtained from a participant's interview in this further research, they will seek written permission.

## APPENDIX B: LIST OF INTERVIEWEES

As noted Appendix A, 40 interviews were conducted as part of my research. Two interviewees requested not to be listed as participants in my research at the time of interview. One interviewee withdrew from my research following consideration of my draft Thesis. The other 37 interviewees are listed below, some by name and others by a descriptor agreed in line with the options described in Appendix A and provided through the Ethics Approval process. As noted in Appendix A, some of the interviewees listed below elected not to have their comments attributed to them by name in the text of the Thesis.

## A Interviewees

|           | <i>Name</i>                        | <i>Position</i>   | <i>Interview Date</i> | <i>Interview Location</i> |
|-----------|------------------------------------|---|-----------------------|---------------------------|
| <b>1</b>  | Cameron Gifford*                   | National Security Branch, Attorney General's Department                             | 23 May 16             | Canberra                  |
| <b>2</b>  | AGD Official A                     | Attorney General's Department   | 23 May 16             | Canberra                  |
| <b>3</b>  | Toni Dawes                         | Secretary, Senate Standing Committee for the Scrutiny of Bills                      | 23 May 16             | Canberra                  |
| <b>4</b>  | Ivan Powell                        | Secretary, Parliamentary Joint Committee on Human Rights                            | 23 May 16             | Canberra                  |
| <b>5</b>  | Parliamentary Library Researcher A | Parliamentary Library   | 23 May 16             | Canberra                  |
| <b>6</b>  | Parliamentary Library Researcher B | Parliamentary Library   | 23 May 16             | Canberra                  |
| <b>7</b>  | Sophie Dunstone                    | Committee Secretary, Senate Standing Committee on Legal and Constitutional Affairs* | 23 May 16             | Canberra                  |
| <b>8</b>  | Maureen Weeks                      | Deputy Clerk of Senate, Parliament House  | 23 May 16             | Canberra                  |
| <b>9</b>  | Simon Henderson                    | Senior Policy Officer, Law Council of Australia*                                    | 23 May 16             | Canberra                  |
| <b>10</b> | Naomi Carde                        | First Assistant Parliamentary Counsel   | 25 May 16             | Canberra                  |
| <b>11</b> | Meredith Leigh                     | Second Parliamentary Counsel  | 25 May 16             | Canberra                  |
| <b>12</b> | Kris Klugman                       | President, Civil Liberties Australia  | 24 May 16             | Canberra                  |
| <b>13</b> | Bill Rowlings                      | Secretary, Civil Liberties Australia  | 24 May 16             | Canberra                  |
| <b>14</b> | Legal Submission Maker             | Legal Representative Organisation   | 24 May 16             | Canberra                  |

|    |                    |  |              |           |
|----|--------------------|--|--------------|-----------|
| 15 | Simon Rice         | Former Legal Advisor to the Parliamentary Joint Committee on Human Rights  | 24 May 16    | Sydney    |
| 16 | Bret Walker SC     | Barrister and former Independent National Security Legislation Monitor   | 24 May 16    | Sydney    |
| 17 | AGD Official B     | Attorney General's Department  | 30 May 16    | Canberra  |
| 18 | Phillip Boulten SC | Barrister and former Law Council of Australia National Criminal Law Committee Member   | 31 May 16    | Sydney    |
| 19 | Helen Potts        | Australian Human Rights Commission   | 31 May 16    | Canberra  |
| 20 | Darren Dick        | Australian Human Rights Commission   | 31 May 16    | Canberra  |
| 19 | Nick Cowdery QC    | Former Law Council of Australia Human Rights Advisor   | 31 May 16    | Canberra  |
| 20 | Lydia Shelly       | Muslim Legal Network*  | 2 June 16    | Telephone |
| 21 | Tony Alderman      | Manager of Government and Communications, Australian Federal Police  | 6 June 16    | Telephone |
| 22 | Aruna Sathanpally  | Legal Advisor, Parliamentary Joint Committee on Human Rights   | 23 June 16   | Telephone |
| 23 | Andrew Bartlett    | Former Democrats Senator for Queensland  | 4 August 16  | Telephone |
| 24 | Peter Quiggin      | First Parliamentary Counsel  | 3 August 16  | Adelaide  |
| 25 | Patricia Crossin   | Former Labor Senator for the Northern Territory and former Chair of the Senate Standing Committee on Legal and Constitutional Affairs  | 10 August 16 | Telephone |
| 26 | Penny Wright       | Former Australian Greens Senator for South Australia, former member of the Parliamentary Joint Committee on Human Rights, former Chair of the Senate Standing Committee on Legal and Constitutional Affairs References Committee | 11 August 16 | Adelaide  |

|           |   |  |                  |           |
|-----------|---|--|------------------|-----------|
| <b>27</b> | Current Liberal Senator                   | Current Liberal Senator for South Australia  | 24 August 16     | Adelaide  |
| <b>28</b> | Dean Smith                                | Liberal Senator for Western Australia and former Chair of the Parliamentary Joint Committee on Human Rights  | 22 September 16  | Telephone |
| <b>29</b> | Jon Stanhope                              | Former Chief Minister of the Australian Capital Territory  | 28 September 16  | Canberra  |
| <b>30</b> | Public Servant                            | Employed by multiple Government Departments and Parliamentary Committees   | 29 September 16  | Canberra  |
| <b>31</b> | Don Farrell                               | Current Labor Senator for South Australia  | 15 November 16   | Adelaide  |
| <b>32</b> | Former senior member of an oversight body | Statutory Oversight Body   | 8 November 16    | Telephone |
| <b>33</b> | Robert Ray                                | Former Labor Senator for Victoria and former member of the Parliamentary Joint Committee on ASIO and the Parliamentary Joint Committee on Intelligence and Security    | 23 November 16   | Telephone |
| <b>34</b> | John Faulkner                             | Former Labor Senator for New South Wales and former member of Parliamentary Joint Committee on ASIO and the Parliamentary Joint Committee on Intelligence and Security | 28 November 2016 | Telephone |
| <b>35</b> | Roger Gyles QC*                           | Barrister and Independent National Security Legislation Monitor  | 6 December 2016  | Telephone |
| <b>36</b> | Legal Submission Maker B*                 | Legal Representative Organisation  |                  | Canberra  |
| <b>37</b> | Nicola McGarrity                          | Gilbert and Tobin Centre for Public Law, University of New South Wales   |                  | Sydney    |

*\* These individuals held this position at the time of interview, but not at the time of Thesis submission*



## APPENDIX C: PUBLIC COMMENTARY ON THE CASE STUDY BILLS

### A Introduction

Table 6.4 in Chapter 6 of the Thesis describes in summary form the nature of public commentary on the case study Bills by listing the approximate number of media articles identified that refer to the case study Bill, the frequency of references to parliamentary scrutiny within those articles and the frequency of reference to rights concepts in those articles. This Table is accompanied by explanatory text that sets out the relevance of this data for the analysis of ‘public impact’ being understood in Chapter 6.

This Appendix provides further detail of the media articles identified and considered with respect to each case study Bill. As noted in Chapter 6, these media articles were located using the *Newspaper Source Plus EBSCO Host* media database accessed through the University of Adelaide library. This comprehensive database<sup>1</sup> allows for targeted searching of Australia media articles, including newspapers and television and radio transcripts. Searches were conducted using keywords to (a) indicate discussion of laws (such as ‘bill’, ‘law’, ‘legislation’), (b) refer to particular case study Bills (such as ‘control order’) (c) identify references to parliamentary committee scrutiny (such as ‘committee’ or ‘review’) and (d) identify references to rights (such as ‘rights’ or ‘freedoms’). Searches were also limited to Australian media articles and search results manually vetted to remove repeat references and any irrelevant results. Searches were also limited by period, generally from the date of introduction of a case study Bill or announcement of a relevant policy proposal underpinning a case study Bill up until the end of the research period (ie December 2015).

Designed to support Table 6.4, this Appendix contains a list of the total number of media articles identified following searches with respect to each case study Bill.

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<sup>1</sup> The information provided on the University of Adelaide’s library website explains that: ‘Newspaper Source Plus includes more than 860 full-text newspapers, providing more than 35 million full-text articles. In addition, the database features more than 857,000 television and radio news transcripts’ (see University of Adelaide, ‘Media Databases’ <<http://libguides.adelaide.edu.au/media/databases>>. A full list of searchable titles within the *Newspaper Source Plus* database is available at <<https://www.ebscohost.com/titleLists/n5h-coverage.pdf>>.

## B *Security Legislation Amendment (Terrorism) Bill 2002*

Alan, Ramsey, 'Told to heel, this dog's still got bite' *The Sydney Morning Herald* (Sydney) 28 June 2003, 39

Brendan Nicholson, Political Correspondent, 'Protect our values, Georgio urges' *The Sunday Age* (Melbourne) 22 September 2002, 6

Damon Cronshaw, 'Terror Zone' *The Newcastle Herald* (Newcastle) 8 January 2003 1

Daryl Williams, 'We'd all be safer if Labor stopped toying with terror' *The Australian* (National) 23 September 2002

George Williams, 'Amended bill hits security target' *The Australian* (National) 27 June 2003

James Norman, 'EFA alarm over email snoop law' *The Australian* (National) 25 June 2002

Linda Kirk, 'Balance terror fight and liberties' *The Advertiser* (Adelaide) 23 December 2002

'ASIO law fears' *The Daily Telegraph*, (Sydney) 21 February 2002

'Flaws in terror laws exposed' *The Courier Mail* (Brisbane) 11 May 2002

'Security vital but so are our liberties' *The Australian* (National) 16 May 2002

'Terror group outlawed' *The Courier Mail*, (Brisbane) 01 November 2002

'Wider powers for police to act' *The Advertiser* (Adelaide) 13 November 2002

'Other threats to freedom', *The Sydney Morning Herald* (Sydney), 28 November 2002, 12

Paul Sheehan, 'PM's double-dissolution trigger finger must be itching over ASIO bill' *The Sydney Morning Herald* (Sydney) 16 December 2002, 13

Tom Allard, 'Ruddock rebuked over outlaw powers' *The Sydney Morning Herald* (Sydney) 8 May 2006, 1

'Will the terrorism bill allow government terrorism?', *The Age* (Melbourne) 17 April 2002, 12

## C *ASIO Legislation Amendment (Terrorism) Bills 2002 and 2003*

Alan Ramsey, 'Enjoy your freedom, sweet 16, but keep an eye out for ASIO' *The Sydney Morning Herald* (Sydney) 25 June 2003, 13

Annabel, Crabb, 'Labor holds out against ASIO bill' *The Age* (Melbourne) 12 November 2002, 10

Annabel, Crabb, 'Lib anger as Labor spurns terror bill' *The Age* (Melbourne) 18 October 2002, 8

Annabel, Crabb, 'ASIO bill stalls as fresh complication is revealed' *The Age* (Melbourne) 24 June 2003, 4

Annabel, Crabb, 'Crean welcomes changes weakening ASIO bill' *The Age* (Melbourne) 13 June 2003, 4

Annabel, Crabb, 'Government offers Labor a deal on ASIO bill' *The Age* (Melbourne) 6 December 2003, 4

Annabel, Crabb, 'Labor gives ASIO powers green light' *The Age* (Melbourne) 26 June 2003, 4

Annabel, Crabb, 'New snag for ASIO bill' *The Age* (Melbourne) 24 June 2003, 4

Annabel Crabb, Fergus Shiel, 'Taking liberties' *The Age* (Melbourne) 21 June 2003, 5

Annabel Crabb, Mark Forbes, 'Williams won't budge on ASIO legislation' *The Age* (Melbourne) 12 May 2002, 2

'ASIO bill is still a threat to freedoms', *The Sydney Morning Herald* (Sydney) 16 September 2002, 12

'ASIO bill stalled', *Illawarra Mercury* (Illawarra) 25 June 2003, 13

Brendan Nicholson, 'Push for ASIO powers' *The Age* (Melbourne) 25 October 2004, 4

Brendan Nicholson, Political Correspondent, 'Joint sittings plan to break deadlocks' *The Sunday Age* (Melbourne) 6 August 2003, 8

Cosima Marriner and Riley Mark, 'ASIO gets sweeping powers of arrest' *The Sydney Morning Herald* (Sydney) 6 December 2003, 1

Cynthia Banham, 'ASIO admits children face strip search' *The Sydney Morning Herald* (Sydney) 5 January 2002, 2

Cynthia Banham, 'Howard, Crean go to war on terrorism' *The Sydney Morning Herald* (Sydney) 14 December 2002, 1

Cynthia Banham, 'Parties clash over push to boost ASIO powers' *The Sydney Morning Herald* (Sydney) 13 December 2002, 6

Cynthia Banham, 'Terrorism poll looms as ASIO bill falters' *The Sydney Morning Herald* (Sydney) 14 December 2002, 1

Cynthia Banham, 'ASIO laws may be invalid, say legal experts' *The Sydney Morning Herald* (Sydney) 27 June 2003, 4

Cynthia Banham, 'ASIO threatened to detain suspect, lawyer claims' *The Sydney Morning Herald* (Sydney) 27 October 2003, 9

Cynthia Banham, 'Repeat warrants fear puts ASIO bill in jeopardy' *The Sydney Morning Herald* (Sydney) 24 June 2003, 6

Cynthia Banham and Goodsir Darren, 'Detention powers too harsh, say senators' *The Sydney Morning Herald* (Sydney) 4 December 2002, 4

Cynthia Banham and Nick, O'Malley, 'Critics `unlikely' to thwart bid to boost ASIO powers' *The Sydney Morning Herald* (Sydney) 5 December 2002, 11

Darrin Farrant, 'Anti-terrorist or anti-democratic?' *The Age* (Melbourne) 2 May 2002, 15

David Wroe, 'Anti-terror laws fourth rate: Ruddock' *The Age* (Melbourne) 4 November 2003, 1

'Defending liberty on the home front', *The Age* (Melbourne) 22 March 2003, 10

Fia Cumming, Political Correspondent, 'ASIO has right to detain for up to six days' *The Sun Herald* (Sydney) 4 July 2002, 39

George Williams, 'Why the new ASIO bill may not pass the constitutional test' *The Age* (Melbourne), 24 June 2003, 11

George Williams and Ben Saul, 'Spying an opportunity to entrench power' *The Sydney Morning Herald* (Sydney) 23 May 2005, 11

Robert McClelland 'Empowering ASIO in planned terrorism bill endangers rights' *The Sydney Morning Herald* (Sydney) 23 May 2005, 13

Jeff Corbett, 'Scrutiny and security' *The Newcastle Herald* (Newcastle) 17 October 2002, 10

Kerry Taylor, 'Terror bills beef up ASIO's power to detain' *The Age* (Melbourne) 1 May 2002, 6

Mark Forbes, 'Liberal call to change terror laws' *The Age* (Melbourne) 13 December 2002, 4

Mark Forbes, Kerry Taylor, 'Williams backs down on ASIO plan' *The Age* (Melbourne) 26 June 2002, 4

Paul Sheehan, 'PM's double-dissolution trigger finger must be itching over ASIO bill' *The Sydney Morning Herald* (Sydney) 16 December 2002, 13

'Secret police warning', *Illawarra Mercury* (Illawarra) 13 May 2003, 10

'Softer ASIO bill', *Illawarra Mercury* (Illawarra) 11 December 2002, 6

'The spy bill that was left out in the cold', *The Sydney Morning Herald* (Sydney) 16 December 2002, 12

'Sunset clause is a form of security', *The Age* (Melbourne) 10 June 2005, 16

D *National Security Information (Criminal Proceedings) Bill 2004 (Cth)*

ABC 'Barristers resist pressure for security clearance', *PM*, 22 September 2005

Brendan Nicholson, 'Balance of justice and national security, or blindfold for the courts?' *The Age* (Melbourne) 5 June 2004, 7

Brendan Nicholson, 'Plan for secret hearings' *The Age* (Melbourne) 25 May 2004, 4

Brendan Nicholson, 'Ruddock seeks secret court sessions' *The Age* (Melbourne) 28 May 2004, 4

Brendan Nicholson National Security, Correspondent, 'Government eases secrecy of terrorist trial evidence' *The Age* (Melbourne) 3 December 2004, 4

Miranda Charles 'Bid to suppress sensitive information in court' *The Courier Mail* (Brisbane) 23 March 2003

Cynthia Banham, 'Defence lawyers face curbs in security-related trials' *The Sydney Morning Herald* (Sydney) 28 May 2004, 4

Joseph Kerr and Tom Allard 'New laws raise fears of targeting, loss of rights' *The Sydney Morning Herald* (Sydney) 28 September 2005, 6

Lincoln Wright, 'Cone of silence' *The Sunday Herald Sun* (Melbourne) 5 December 2004

Patrick Walters, 'Press lobby wins reforms to national security crime bill' *The Australian* (National) 9 December 2004

'Silence in court', *Herald Sun* (Melbourne) 8 March 2005

E *Anti-Terrorism Bill (No 2) 2005*

'PM moves to win support for terror law' *The Cairns Post* (Cairns) 1 November 2005

'States shoot down draft terror laws' *The Cairns Post* (Cairns) 21 October 2005

'Tough powers in new laws to counter terror' *The Cairns Post* (Cairns) 4 November 2005

'AAP National News Wire Round-Up for Breakfast, Aug 29', *AAP National News Wire* 29 August 2006

'AAP National News Wire Round-Up for Breakfast, Nov 10', *AAP National News Wire* 10 November 2005

'Alarm over terror laws' *The Daily Telegraph* (Sydney) 18 March 2006

Andrew Darby, Brendan Nicholson and Khadem Nassim, 'Tougher anti-terror laws may be considered, says Ruddock' *The Age* (Melbourne) 29 September 2005, 1

Ben Haywood, 'On the attack' *The Age* (Melbourne) 3 October 2005

'Blair gets new anti-terror law', *The Sunday Times* (Perth) 13 March 2005

Brendan Nicholson, National Security Correspondent, 'Drop legislation, PM urged' *The Age* (Melbourne) 15 November 2005 (

Bronwyn Hurrell, 'No time wasted to tackle threat' *The Mercury* (Hobart) 4 November 2005

Nigel Adlam, 'Martin signs NT up for `draconian' laws' *Northern Territory News* (Darwin) 28 September 2005

Cameron Stewart, 'Laws will expose 80 Muslims' *The Australian* (National) 22 October 2005

Xavier La Canna, 'Terror suspect ordered back from holiday' *The Advertiser* (Adelaide) 29 August 2006

'Counter-terrorism package released', *Townsville Bulletin* (Townsville) 4 November 2005

Cynthia, Banham and Peatling Stephanie, 'Urgent terror laws may not lead to arrests' *The Sydney Morning Herald* (Sydney) 7 November 2005

Darrin, Barnett, 'Fed: Muslim groups distance themselves from new anti-terror laws' *AAP Australian National News Wire* 8 October 2005

David, Germain, 'Remembering the horror' *The Courier Mail* (Brisbane) 17 August 2006

David, Marr and Wilkinson Marian, 'Cracks in terror solidarity' *The Sydney Morning Herald* (Sydney) 28 October 2005

David, Neal, 'Anti-terrorism bill ignores basics of due process' *The Australian* (National) 28 October 2005

David, Neal, 'Proof new law not needed' *The Age* (Melbourne) 10 November 2005

David, Rood, 'Top lawyer damns 'unfair' terror laws' (2005) 7 November 2005

Ed Johnson in, London, 'UK's tough terror laws; Government targets eight suspects' *The Sunday Mail* (Adelaide) 13 March 2005

'Family claims curfew puts mental strain on Thomas', *The Gold Coast Bulletin* (Gold Coast) 30 August 2006

Farrah, Tomazin and Nicholson Brendan, 'Legal doubt on proposed terror laws Preventive detention may be illegal' *The Age* (Melbourne) 30 August 2006

'Fed: 80 Australians face immediate house arrest under new laws', *AAP Australian National News Wire* 22 October 2005

'Fed: Anger management classes for terrorist suspects', *AAP Australian National News Wire* 12 December 2005

'Fed: Anti-terror laws alarm Muslims, civil libertarians', *AAP Australian National News Wire* 28 September 2005

'Fed: Anti-terror laws will breach child rights: Amnesty', *AAP Australian National News Wire* 28 September 2005

'Fed: Anti-terror laws too restrictive: Law Council of Australia', *AAP Australian National News Wire* 05 December 2005

'Fed: Attorney-General opens Muslim leaders' meeting', *AAP Australian National News Wire*, 6 October 2005

'Fed: Attorney to address Muslim leaders', *AAP Australian National News Wire* 5 October 2005

'Fed: Beazley out to toughen up anti-terror laws', *AAP Australian National News Wire* 30 October 2005

'Fed: Beazley says terror laws need more scrutiny', *AAP Australian National News Wire* 25 October 2005

'Fed: Bracks, Gallop upbeat on anti-terror package', *AAP Australian National News Wire* 26 September 2005

'Fed: Chilling words to become part of Aust slang - Amnesty', *AAP Australian National News Wire* 30 October 2005

'Fed: Do not fear terror video, Vic Opposition leader urges', *AAP Australian National News Wire* 12 September 2005

'Fed: End in sight for terror law debate', *AAP Australian National News Wire* 01 November 2005

'Fed: Fears for human rights under anti-terror laws: HREOC', *AAP Australian National News Wire* 27 September 2005

'Fed: Features of new anti-terrorism laws', *AAP Australian National News Wire* 3 November 2005

'Fed: Georgiou continues campaign against terror laws', *AAP Australian National News Wire* 21 October 2005

'Fed: Govt accused of using control order to preserve credibility', *AAP Australian National News Wire* 30 August 2006

'Fed: Govt steams ahead with anti-terror laws', *AAP Australian National News Wire* 26 October 2005

'Fed: Govt will consider overriding ACT laws on counter-terrorism', *AAP Australian National News Wire* 24 July 2006

'Fed: Hopper says more checks and balances needed', *AAP Australian National News Wire* 30 October 2005

'Fed: How will anti terror laws make us safer? - Law Council', *AAP Australian National News Wire* 09 September 2005

'Fed: Howard agrees to changes in bid to secure states support', *AAP Australian National News Wire* 31 October 2005

'Fed: Howard confident of anti-terror laws safeguards', *AAP Australian National News Wire* 23 October 2005

'Fed: Howard govt failing Australians on terrorism: Beazley', *AAP Australian National News Wire* 12 September 2005

'Fed: Joyce supports new terror laws', *AAP Australian National News Wire* 08 November 2005

'Fed: Jurists raise major concerns with anti-terror laws', *AAP Australian National News Wire* 17 March 2006

'Fed: Labor calls for sunset clause in new anti-terror laws', *AAP Australian National News Wire* 19 September 2005

'Fed: Labor MP says citizens could be terrorised', *AAP Australian National News Wire* 31 October 2005

'Fed: Law Society says terror laws allow judges to opt-out', *AAP Australian National News Wire* 26 October 2005

'Fed: Lawyers, doctors to protest anti-terror laws at PM's house', *AAP Australian National News Wire* 30 October 2005

'Fed: Legal opinion growing against harsh anti-terror laws - LCA', *AAP Australian National News Wire*, 12 October 2005

'Fed: Main points in anti-terror laws', *AAP Australian National News Wire* 6 December 2005

'Fed: Moves to amend anti-terrorism laws in Senate', *AAP Australian National News Wire* 30 November 2005

'Fed: MPs to begin debating tough new anti-terror laws', *AAP Australian National News Wire* 10 November 2005



'Fed: No deal on counter-terrorism laws today - Beattie', *AAP Australian National News Wire* 1 November 2005

'Fed: No plans to change anti-terror laws: Howard', *AAP Australian National News Wire* 18 October 2005

'Fed: NSW Labor state MPs attack terror laws', *AAP Australian National News Wire* 28 October 2005

'Fed: NSW Law Society condemns draft anti-terror laws', *AAP Australian National News Wire* 15 October 2005

'Fed: Opinion hardening against harsh anti-terror laws - lawyers', *AAP Australian National News Wire* 12 October 2005

'Fed: PM appears likely to get Xmas wish of new terror laws', *AAP Australian National News Wire* 4 November 2005

'Fed: PM close to deal with states on terror laws', *AAP Australian National News Wire* 2 November 2005

'Fed: PM does not like having to introduce new anti-terror laws', *AAP Australian National News Wire* 28 September 2005

'Fed: PM Howard phones state leaders over terror laws', *AAP Australian National News Wire* 26 October 2005

'Fed: PM Howard says terror laws are constitutional', *AAP Australian National News Wire* 25 October 2005

'Fed: PM won't comment on Thomas case', *AAP Australian National News Wire* 30 August 2006

'Fed: Premier Beattie says he's hopeful of terror deal', *AAP Australian National News Wire* 1 November 2005

'Fed: Premiers confident of agreement on anti-terror laws', *AAP Australian National News Wire* 26 September 2005

'Fed: Raids, laws not attacks on Muslims, says Howard', *AAP Australian National News Wire* 9 November 2005

'Fed: Report says terror laws breach rights', *AAP Australian National News Wire* 19 October 2005

'Fed: Ruddock has vilified acquitted terror suspect - lawyer', *AAP Australian National News Wire* 29 August 2006

'Fed: Ruddock says govt ready to act once terror laws are passed', *AAP Australian National News Wire* 28 October 2005

'Fed: Ruddock says terror deadline now Tuesday', *AAP Australian National News Wire* 31 October 2005

'Fed: Ruddock to explain anti-terror laws to Muslim leaders', *AAP Australian National News Wire* 6 October 2005

'Fed: Safeguards against abuse of new anti-terror powers', *AAP Australian National News Wire* 27 September 2005

'Fed: Senate committee hearing on anti-terror bill continues', *AAP Australian National News Wire* 17 November 2005

'Fed: Senate inquiry under way into anti-terror laws', *AAP Australian National News Wire* 14 November 2005

'Fed: Stanhope holds out on terror bill', *AAP Australian National News Wire* 2 November 2005

'Fed: State leaders still concerned over terror laws', *AAP Australian National News Wire* 31 October 2005

'Fed: States agree on tougher anti-terror powers', *AAP Australian National News Wire* 27 September 2005

'Fed: States back away from support for anti-terror laws', *AAP Australian National News Wire* 19 October 2005

'Fed: Terror laws balanced: Bracks', *AAP Australian National News Wire* 28 September 2005

'Fed: Terror laws threaten freedoms, say groups', *AAP Australian National News Wire* 10 October 2005

'Fed: Terrorism laws in place "before Christmas" -- report', *AAP Australian National News Wire* 23 October 2005

'Fed: Tough new anti-sedition powers in anti-terror laws', *AAP Australian National News Wire* 3 November 2005

'Fed: Wide-ranging new terror laws outlined', *AAP Australian National News Wire* 8 September 2005

'Fed: Australia plays host to citizens who hold values in contempt', *AAP Australian National News Wire* 28 September 2005

Fergus Shiel, Law Reporter, 'Laws the greatest attack on freedom, says former judge' *AAP Australian National News Wire* 5 November 2005

'Fighting terror need not erode freedom', *The Courier Mail* (Brisbane) 5 November 2005

George Williams, 'High Court must settle terror law dispute' *The Advertiser* (Adelaide) 1 September 2006

George Williams, 'Jumping the gun on terror' *The Age* (Melbourne) 27 October 2005

George Williams and Edwina MacDonald, 'Separation of powers may be under threat' *The Age* (Melbourne) 30 August 2006

'Terror pact' (2005) 1 < Newcastle Herald, The (includes the Central Coast Herald) 28 September 2005

Greg Kelton, 'Pass terror laws now, Rann urges' *The Advertiser* (Adelaide) 21 November 2005

'Howard calls legal summit on terror laws', *The Daily Telegraph* (Sydney) 26 October 2005

'Howard should trust courts on terror laws', *The Courier Mail* (Brisbane) 2 November 2005

Ian Barker and Robert Toner, 'Ruddock lowers the bar on legal terror tactics' *The Sydney Morning Herald* (Sydney) 1 November 2005

Ian Munro, 'Anti-terror orders a 'legal minefield'' *The Age* (Melbourne) 25 October 2005

Ian Munro, 'Call to prove detention need' *The Age* (Melbourne) 3 November 2005

Ian Munro, 'Courts' role in new laws called into question' *The Age* (Melbourne) 26 October 2005

'In Brief', *The Cairns Post* (Cairns) 29 August 2006

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## APPENDIX D: RIGHTS-ENHANCING CHANGES TO CASE STUDY ACTS

The evidence in Part II suggests that the work of parliamentary committees directly contributed to the following rights-enhancing changes to the case study Acts:

- narrowing the scope of a number of key definitions used in the counter-terrorism legislative framework, including the definition of ‘terrorist act’;<sup>1</sup>
- removing absolute liability and reverse onus of proof provisions from the terrorist act related offences introduced by the SLAT Bills and contained in Division 101 of the Criminal Code;<sup>2</sup>
- inserting defences within these terrorist act offences for the provision of humanitarian aid;<sup>3</sup>
- ensuring the power to proscribe terrorist organisations is subject to parliamentary review;<sup>4</sup>

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<sup>1</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) and Related Bills, Items 5 and 8; in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 2.

<sup>2</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth), Items 11, 13, 14; in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 3.

<sup>3</sup> Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and (Cth), Item 4, in response to Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 1.

<sup>4</sup> See e.g. Supplementary Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth). See also Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002).

- subjecting each major tranche of counter-terrorism reform to mandatory and regular parliamentary review, for example through the use of sunset clauses<sup>5</sup> or referral to the PJCIS or INSLM;<sup>6</sup>
- subjecting each new law enforcement and intelligence agency power to a raft of detailed reporting requirements and oversight by the Ombudsman and/or the IGIS;<sup>7</sup>
- ensuring persons detained under an ASIO questioning and detention warrant are adults, have access to legal representation, are protected against self-incrimination and have access to judicial review of detention at regular intervals;<sup>8</sup>
- ensuring that pre-charge detention of people thought to have information relevant to terrorist investigations is subject to judicial oversight and maximum time limits;<sup>9</sup>
- re-instating the court's discretion to ensure that a person receives a fair trial when certain national security information is handled in 'closed court', and limiting the potential to exclude relevant information from the defendant in counter-terrorism trials;<sup>10</sup>

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<sup>5</sup> See e.g. see ASIO Amendment (Terrorism) Bill 2003 (Cth) adopting Senate Standing Committee on Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, (2002) Recommendation 27.

<sup>6</sup> See e.g. George Brandis and Malcolm Turnbull, 'Government response to committee report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014' (Media Release, 3 April 2015); George Brandis, 'Government Response to Committee Report on the Counter-Terrorism Legislation Amendment Bill (No. 1) 2014' (Media Release, 25 November 2014).

<sup>7</sup> Ibid, see also Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth).

<sup>8</sup> See Supplementary Explanatory Memorandum, Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (Cth) and Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendations at viii-ix. See also ASIO Amendment (Terrorism) Bill 2003 (Cth).

<sup>9</sup> See e.g. Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) Items 4, 5, 6, 7 and 8 which implement Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Anti-Terrorism Bill 2004*, (2004) Recommendations 1-4.

<sup>10</sup> Supplementary Explanatory Memorandum, National Security Information (Criminal Proceedings) Bill 2004 (Cth), 'General Outline' and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004* (2004).

- ensuring people subject to control orders and preventative detention orders can understand and challenge the material relied upon to make the order and limiting the regime to adults only;<sup>11</sup>
- establishing the position of Independent National Security Legislation Monitor and ensuring the Monitor has a specific mandate to consider the human rights implications of Australia's counter-terrorism laws;<sup>12</sup>
- narrowing the scope of terrorist related treason offences;<sup>13</sup>
- requiring that telecommunications data be defined in primary legislation, and any data retained by authorities be de-identified or destroyed after two years;<sup>14</sup>
- ensuring that detailed public records be kept of the use of retained telecommunications data;<sup>15</sup>
- protecting the data of journalists from being accessed;<sup>16</sup>
- increasing the oversight powers and review functions of the PJCIS, including to examine the counter-terrorism activities of the Australian Federal Police;<sup>17</sup>

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<sup>11</sup> See Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005 Bill and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005).

<sup>12</sup> See Supplementary Explanatory Memorandum, National Security Legislation Monitor Bill 2009 (Cth) and Senate Standing Committee on Finance and Administration, Parliament of Australia, *Inquiry into National Security Legislation Monitor Bill 2009*, (2009).

<sup>13</sup> See Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) (particularly Item 15) and Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

<sup>14</sup> See Revised Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), General Outline; Supplementary Explanatory Memorandum, Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Cth), General Outline and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (2015).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> See George Brandis, Attorney General, 'Government Response to the Committee's report on the Foreign Fighters Bill' (Media Release, 22 October 2014); Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); and Parliamentary Joint Committee on Intelligence and Security,

- narrowing the scope of the proposed ‘declared area’ offences in the Criminal Code and ensuring that such declarations are subject to disallowance by parliament;<sup>18</sup>
- preserving the safeguards relating to specifying and reviewing the conditions imposed as part of a control order or preventive detention order;<sup>19</sup>
- narrowing the circumstances in which a dual national can have their citizenship ‘renounced’ by doing something terrorist-related overseas, including by narrowing the range of conduct that can trigger the provisions; and making it clear that the laws cannot be applied to children under 14;<sup>20</sup> and
- ensuring that formal guidance materials and drafting directions require law makers to turn their mind to the extent to which proposed provisions unjustly interfere with individual rights, and/or engage human rights principles.<sup>21</sup>

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Parliament of Australia, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, (2014,) xv.

<sup>18</sup> See George Brandis, Attorney General, ‘Government Response to the Committee's report on the Foreign Fighters Bill ‘ (Media Release, 22 October 2014); Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendation 18.

<sup>19</sup> George Brandis, Attorney General, ‘Government Response to the Committee's report on the Foreign Fighters Bill ‘ (Media Release, 22 October 2014); Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); Supplementary Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth); and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014), Recommendations 5 – 9.

<sup>20</sup> See Supplementary Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) amended clause 33AA(1); see also Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), and Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015).

<sup>21</sup> See e.g. Department of the Prime Minister and Cabinet, *Legislation Handbook*, (2017); Office of Parliamentary Counsel, Commonwealth Government, *Drafting Direction No 3.1* (January 2017); Attorney General's Department, Commonwealth Government, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2001) <<https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx>>. See also discussion in Chapter 7.

## APPENDIX E: EMERGING RIGHTS AND SCRUTINY PRINCIPLES

The rights and scrutiny principles most commonly discussed during parliamentary consideration of the case study Acts can be summarised as follows:<sup>1</sup>

- The proposed provisions and Explanatory Memorandum should be clearly drafted so the meaning and policy aim is clear to Parliament.<sup>2</sup>
- The expansion of executive power must come with procedural fairness guarantees: including access to legal representation, preservation of common law privileges and access to judicial review.<sup>3</sup>
- Parliament should have access to information about how government departments and agencies are using their powers.<sup>4</sup>
- If the law is designed to respond to an extraordinary set of circumstances, Parliament should be required to revisit the law to determine whether it is still needed.<sup>5</sup>

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<sup>1</sup> This list of rights and scrutiny principles is derived from the detailed analysis set out in Part II of the Thesis, including the specific examples provided of rights-enhancing change discussed in Chapters 3 and 5 and summarised in Appendix D.

<sup>2</sup> See e.g. Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010) Recommendations 1 and 2.

<sup>3</sup> See e.g. Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) Recommendation 4; See Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), Chapter 3 [3.22]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

<sup>4</sup> See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) vii; Senate Standing Committee on Constitutional and Legal Affairs Legislation Committee, Parliament of Australia, *Independent Reviewer of Terrorism Laws Bill 2008 [No. 2]*, (2008); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015) Recommendation 10.

<sup>5</sup> See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) Recommendation 13; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Thirteenth Report of 2014*, (28 October 2014); Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (2002) Recommendation 12.

- New criminal offences should have clearly defined physical and mental elements, allocate the burden of proof to the prosecution, ensure access to legal representation, and not apply retrospectively.<sup>6</sup>
- Any restriction of free speech should be accompanied by exceptions to promote robust debate on matters of public interest.<sup>7</sup>
- Freedom of association and the right to privacy should not be unduly burdened and any restriction should be subject to independent oversight.<sup>8</sup>
- The proposed law should not infringe freedom of religion, and should respect Australia's ethnic and cultural diversity.<sup>9</sup>
- The rights of children require special protection.<sup>10</sup>

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<sup>6</sup> See e.g. Anti-Terrorism Bill (No. 2) 2005 Bill, Schedule of the amendments made by the Senate, Items 68-72; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 13 of 2005*, (9 November 2005) 8, 14-16; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest relating to the Counter- Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (13 October 2014).

<sup>7</sup> See e.g. Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 7 of 2015*, (12 August 2015) 3, 10; Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, (2005), Recommendations 27 and 28, see also Chapter 5; Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (2010).

<sup>8</sup> See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (27 February 2015); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Fifteenth Report of 44<sup>th</sup> Parliament* (14 November 2014) 10, 16-17; Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Matters* (2002) 32-44.

<sup>9</sup> See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-fifth Report of the 44<sup>th</sup> Parliament*, (11 August 2015). Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest No 7 of 2015* (12 August 2015).

<sup>10</sup> See e.g. Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Provisions of the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (2015) Chapter 6; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Twenty-fifth Report of the 44<sup>th</sup> Parliament*, (11 August 2015) Part 3; Senate Standing Committee on Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, (2002) Recommendation 27.

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